

17  
No. 96-663-CFX

Title: Marvin Klehr, et ux., Petitioners  
v.  
A. O. Smith Corporation and A. O. Smith Harvestore  
Products, Inc.

Docketed:

October 29, 1996

Court: United States Court of Appeals for  
the Eighth Circuit

Entry Date

Proceedings and Orders

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Oct 25 1996	Petition for writ of certiorari filed. (Response due November 28, 1996)
Nov 25 1996	Brief of respondents A. O. Smith Corporation, et al. in opposition filed.
Dec 4 1996	DISTRIBUTED. January 3, 1997
Dec 4 1996	Reply brief of petitioners Marvin Klehr and Mary Klehr filed.
Jan 8 1997	REDISTRIBUTED. January 10, 1997
Jan 10 1997	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 21, 1997. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 21, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 7, 1997. Rule 29.2 does not apply. SET FOR ARGUMENT April 21, 1997.
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Feb 21 1997	Joint appendix filed.
Feb 21 1997	Brief of petitioners Marvin Klehr and Mary Klehr filed.
Feb 21 1997	Brief amicus curiae of Natl. Association of Securities and Commercial Law Attorneys filed.
Feb 28 1997	Record filed.
Feb 28 1997	CIRCULATED.
Mar 5 1997	Motion of Plaintiffs' Executive Committee MDL No. 1069, et al. for leave to file a brief as amici curiae filed.
Mar 19 1997	Brief of respondents A.O. Smith Corporation, et al. filed.
Mar 20 1997	Motion of American Council of Life Insurance, et al. for leave to participate in oral argument as amici curiae filed.
Mar 20 1997	Brief amici curiae of American Council of Life Insurance, et al. filed.
Mar 20 1997	Brief amicus curiae of National Hockey League filed.
Mar 21 1997	Opposition of respondents to motion of American Council of Life Insurance, et al. for leave to participate in oral argument as amici curiae filed.
Mar 21 1997	Brief amici curiae of Washington Legal Foundation, et al. filed.
Mar 21 1997	Brief amicus curiae of National Association of Manufacturers filed.
Mar 24 1997	Motion of Plaintiffs' Executive Committee MDL No. 1069, et al. for leave to file a brief as amici curiae GRANTED.
Mar 31 1997	Motion of American Council of Life Insurance, et al. for leave to participate in oral argument as amici curiae

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Entry     Date

Proceedings and Orders

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Apr 7 1997	DENIED. Reply brief of petitioners Marvin Klehr and Mary Klehr filed.
Apr 21 1997	ARGUED.
Apr 23 1997	Record filed.

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In the  
**Supreme Court of the United States**  
October Term, 1996

MARVIN KLEHR AND MARY KLEHR

*Petitioners,*

v.

A.O. SMITH CORPORATION AND  
A.O. SMITH HARVESTORE PRODUCTS, INC.,

*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. When does a civil RICO claim accrue for statute of limitations purposes where the Respondent continues to commit predicate acts which cause Petitioners additional, continuous, or accumulating damages within four years of bringing suit?
2. Do affirmative continuing acts of fraud including continuous false advertisements coupled with active cover up of the fraud, act to equitably toll the statute of limitations in a civil RICO case whether or not Petitioners have exercised reasonable diligence to discover their claim?



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**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1996**

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**MARVIN KLEHR AND MARY KLEHR** (*Petitioners*)

**v.**

**A.O. SMITH CORPORATION AND  
A.O. SMITH HARVESTORE PRODUCTS, INC.**  
(*Respondents*)

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*Petition for Writ of Certiorari to the United States Court of  
Appeals for the Eighth Circuit*

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Marvin Klehr and Mary Klehr respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## **OPINIONS BELOW**

The Opinion of the Court of Appeals (App. A) is reported at 87 F.3d 231. The opinion of the district court (App.B) is reported at 875 F. Supp. 1342.

## **JURISDICTION**

The Court of Appeals entered its judgment by denying the Petition for Rehearing on July 29, 1996 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## **STATUTORY PROVISIONS INVOLVED**

18 U.S.C. §1962(c) provides that "it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." "Racketeering activity" is defined in 18 U.S.C. §1961 to include "any act which is indictable under any of the following provisions of title 18, United States Code: ...section 1341 (relating to mail fraud), section 1343 (relating to wire fraud)..." 18 U.S.C. §1964(c) provides that "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

## **STATEMENT OF THE CASE**

Petitioners, husband and wife, are dairy farmers, who sued the Respondents in August, 1993 in U.S. District Court in Minnesota, alleging, among other things, a violation of the RICO statutes. They alleged they had been defrauded in (a) the purchase and (b) the subsequent continuing use and repair of an animal feed storage silo. The predicate acts underlying the RICO claim were mail and wire fraud. 18 U.S.C. §§1341, 1343. Jurisdiction of the Federal District Court was invoked under 18 U.S.C. §1964 (c) and 28 U.S.C. §1331 (general federal question jurisdiction). The district court dismissed the case on summary judgment based upon violation the statute of limitations. The Court of Appeals affirmed.

### **A. Defendants Affirmative Concealment of the Fraud and Affirmative Continuing Fraudulent Representations Caused Damage and Prevented Petitioners from Discovering the Fraud.**

This case presents two distinct issues: (a) whether the appropriate rule of accrual of the statute of limitations for continuing RICO predicate acts occurring within 4 (four) years of the commencement of the lawsuit and (b) whether Respondents affirmative acts of concealment and continued fraudulent misrepresentations of the product to the Petitioners after the sale, equitably tolls the statute of limitations notwithstanding that Plaintiffs may have failed to exercise due diligence in discovering the fraud.

The Petitioners purchased a Harvestore brand silo from MVBA, a local dealer for A.O. Smith Harvestore Products, Inc. (hereafter "AOSHPI") in 1974. AOSHPI is a wholly owned subsidiary of A.O. Smith Corporation (hereafter "AOS") which

holds many of the patents for the Harvestore silo and did the vast majority of the secret internal research through which it knew that the product was defective in design

These design defects caused rapid deterioration of stored feeds. The design defects caused injury to the Petitioners' livestock, loss of milk production, and continuing needless "repairs" to the silo and associated equipment.

AOSHPI, through its local dealer and in other advertising venues, made numerous fraudulent claims through the use of the U.S. Mail and interstate wires concerning the ability of the silo to properly store and preserve feed. The fraudulent statements are set forth in the Amended Complaint (App. G-1 to G-29) and include claims that the silo would "prevent oxygen from contacting the feed", that the dealer (in this case MVBA) had access to all the research regarding the product, that good Harvestore feed smelled like "molasses", and that AOS engineers had solved the problem of structure breathing. These representations came to the Petitioners in the form of oral representations and a broadly based marketing campaign which included brochures, movies, the "Harvestore Farmer" magazine (published by AOSHPI) and advertisements in numerous national farm journals. *Ibid.*

The Respondents knew that the representations concerning the silo were false.<sup>1</sup> AOS had conducted

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<sup>1</sup> The product defects and fraudulent statements are documented in the Amended Complaint. App. G-30 to G-35. Juries and courts have found the representations regarding the Harvestore structures to be false and courts have roundly criticized AOSHPI for its fraudulent actions and disregard for the truth. Included among those: Kronebusch v. MVBA Harvestore System, 488 N.W.2d 490 (Minn. Ct. App. 1992) (review denied); AgriStar Leasing v. Saylor, 803 F.2d 1401, 1403, 1408 (6th Cir. 1986) (retrial ordered to consider statute of limitations); AgriStar Leasing v. A.O. Smith Harvestore Products, Inc., 869 F.2d 264, 265-266 (6th Cir. 1989); First National Bank of Louisville v. Brooks Farms, 821 S.W.2d 925, 927 (Tenn. 1991); Estate of Korf v. A.O. Smith Harvestore Products, Inc., 917 F.2d 480, 482 (10th Cir. 1990); Lollar v. A.O. Smith Harvestore Products, Inc., 795 S.W.2d 441, 442 (Mo. App. 1990) (app. to transfer

voluminous research on the Harvestore silo which contradicted the advertising claims. This research, at the direction of AOS, was all marked "secret and confidential." The general counsel for AOS had directed in 1968 that known defects in Harvestore silos should be protected from discovery in lawsuits by making sure that scientific studies be addressed to the AOS legal department, with copies to the true intended recipient, so that the company could falsely claim attorney/client privilege. App. E. This scheme was specifically intended to prevent discovery in civil suits concerning the known design defects in the Harvestore silo. None of this contradictory and extremely damaging internal research was ever communicated to MVBA (or any other dealers) nor to the farm customers. This was contrary to what had been represented in the advertising. See, e.g. G-29 and G-30 (Birth of a Harvestore film). Nor was this research ever published to the academic community, who were doing empirical research that ostensibly supported the false advertising claims. The Respondents then used the academic research in their advertising, but kept the contradictory and accurate internal studies secret.

The Plaintiffs purchased the silo in 1974 based upon numerous fraudulent representations regarding the ability of the silo to properly preserve stored feed. App. G-1 to G-14.

In spite of Respondents knowledge of the design defects in the silos, they not only sold the silos initially but also "continued to sell" the product and repairs for the product after it was purchased by the farm customer. This "continue to sell" campaign was a broad based marketing approach which included a continuous, free and unsolicited subscription to a "Harvestore" magazine. Each issue of this magazine included stories depicting extremely successful farmers from all over the country who attributed their success to their Harvestore silos. These magazines also included "Question and Answer" columns

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denied).



in which proper management of the silo was represented to be the key to successful use of the silo. AOSHPI also falsely advertised in numerous other farm journals and publications, and provided false information to its dealers and directly to farmers. Through the dealers, AOSHPI orchestrated other "after sale" techniques such as farmer meetings, dealers training sessions, movies, and presentations at fairs and farm shows. This media barrage was specifically intended to "keep them sold."

At the same time that this after sale campaign was convincing the Petitioners to look elsewhere on their farm for the source of their injury, the Respondents were continuing to engage in product research which established the falsity of the marketing campaign. This scientific research was actively concealed, and marked secret and confidential. Instead of publishing their own damning research as promised in the advertising, the Respondents published favorable empirical research from university professors who were also kept in the dark about the infirmities of the silo.

The Petitioners in this case were continually duped by AOSHPI's post-sale predicate acts into believing their Harvestore was the "cadillac" of silos. The continuous barrage of after sale merchandising had its intended effect. App. G-14 to G-30. Petitioners were lulled into continuing to use the silo and spend more money on "repairs" to the Harvestore silo. In the case of the Petitioners, the last two predicate acts which caused damage took place in the fall of 1989, within 4 years of initiating suit in August, 1993. App. G-22, G-25; App. F. The Petitioners continued to use the silo until 1991. The post-sale ads not only reiterated the pre-sale claims but made new and different claims. They testified that the post-sale fraud caused them to overlook their silo as a source of any injury on their farm. Because the silos are supposedly "sealed" to prevent losses to the feed, the Petitioners were told not to open any doors or hatches. A sign on the side of the silo warned the

Petitioners not to go inside because there is "not enough oxygen to support life." It is practically impossible for the farmer to visually inspect the bottom of the silo, where all the damage occurs to the feed. The mold created in the bottom of the silo is caused to "disappear" by the churning action of the unloader, so the Petitioners didn't see mold in the feed that was fed to the livestock.

By continuing to use the silo, the Petitioners continued to incur injury for damaged livestock, and loss of milk production. The repairs to the silo continued until 1990, less than three years before suit was filed in August, 1993. The Petitioners discovered the causal connection between the Harvestore silo and their damages in March, 1991, when a university professor they had consulted removed an access panel on the silo and chopped through 2-3 feet of compacted feed in the bottom of the silo. By using a video camera with spotlight attached to a long pole, the professor discovered great quantities of mold in a void space immediately above the unloader. The professor demonstrated to Petitioner Marvin Klehr how none of this mold could be seen by the naked eye when it came out of the silo.

#### B. Proceedings Below.

The district court ruled that, because Petitioners were aware of the falsity of certain "non-actionable" representations,<sup>2</sup> they were put on notice of possible fraud and therefore concluded that the Petitioners had not used reasonable diligence

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<sup>2</sup> "Non-actionable" because they constituted statements of opinion or related to future performance of the silo, which courts have traditionally held do not support claims of fraud. Restatement (Second) of Torts §§539,542. These included representations that the Petitioners would have better animal health, reduced protein supplements, increased milk production and make more money. Petitioners Amended Complaint was not based upon the non-actionable representations. See App. G.

to investigate the fraud. Because more than six years (the state statute of limitations) had elapsed from the time the Petitioners should have discovered the actionable fraud, their state law fraud claims were held to be barred by the statute of limitations. The Court went on to hold that the RICO statute incorporated a similar due diligence requirement and therefore dismissed these claims as well.

The district court said that the Petitioners did not exercise reasonable diligence to discover the fraud, and, even though they did not *know* of the fraud, fraudulent concealment would not work to toll the statute because they *should have known*. App. B-13. The district court ignored and did not discuss AOS attorney's scheme to address scientific studies concerning the Harvestore silos to the legal department to falsely obtain an attorney/client privilege in civil discovery proceedings. *Supra*, at p. 5; and App. E. Nor did the district court discuss the scheme of the Respondents to cover up its internal research program which continued to demonstrate the falsity of the advertising claims. The district court held that the post-sale advertisements did not support equitable tolling (under state law principles) as a matter of law.

The district court dismissed Petitioners' RICO claims holding that Petitioners' failure of due diligence caused the statute to run, stating that "the same facts which should have alerted them to the fraud also should have alerted them that the alleged misrepresentations and injuries were part of a pattern." The district court rejected Petitioners' claims based upon the post-sale advertisements, concluding that the Petitioners suffered no new "independent injury" but rather just a "continuation of damages" that they had suffered since 1975. The district court ignored and did not address Petitioners' claims that their injuries in later years were proximately caused by the advertisements published and relied upon by the Petitioners within the statute of limitations.

The circuit court affirmed the district court, using nearly identical reasoning. The Petitioners were required by the circuit court to affirmatively investigate facts that "*might* constitute a *possible* cause of action for fraud." App. A-11. (Emphasis added.) The circuit court did not address Petitioners' argument that there was continuing unlawful conduct by the Respondents within 4 years of bringing suit, which conduct was a proximate cause of Petitioners' continuing new damages. Petitioners had alleged in the Complaint that they reasonably relied upon fraudulent post-sale advertising published less than 4 years before filing the Amended Complaint which was a substantial contributing cause of damages within the statute of limitations. Petitioners' argument was misconstrued by the court as being a claim that any later *injury* automatically extended the statute of limitations on the original claim<sup>3</sup>. Petitioners' true argument was that later predicate *acts* that *caused damage* would work to create a *new claim*. This is the separate accrual rule accepted by a majority of the circuit courts. *Bingham v. Zolt*, 66 F.3d 553, 559 (2d Cir. 1995) (discussing conflict in the circuits and the separate accrual rule as adopted in the second circuit). Having recast Petitioners' argument, the court of appeals rejected it on the basis of its rejection of the "last predicate act" rule, citing *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991).

The circuit court gave no consideration to the AOS scheme to cover up and prevent discovery of damaging internal research which directly contradicted the advertising claims. App. E. The circuit court accepted the reasoning of the district court that new predicate acts in the form of post-sale advertising does not constitute concealment. The Petitioners' failure of due diligence was held to completely preclude application of the federal equitable estoppel doctrine. App. A-17 at f.n. 11.

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<sup>3</sup> This is the "last predicate act or injury" rule of the 3d circuit espoused in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1126 (3d Cir. 1988).



## **REASONS FOR GRANTING THE PETITION**

This case involves two important issues: (1) accrual of the statute of limitations where there is continuing criminal conduct within the statute of limitations and (2) equitable tolling of the statute of limitations in civil RICO cases, where the Defendants have combined to actively conceal and cover up the fraud and also continue to falsely promote and advertise the product. In each of these areas, the decisions of the circuit courts are in conflict. This case presents an opportunity for the Court to clarify both of these muddled areas of the law.

Two seminal cases of this Court are the starting point of discussion. In Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 107 S. Ct. 2759, 97 L. Ed.2d 121 (1987), this Court held that the similarities in purpose and structure between RICO and the Clayton Act counseled in favor of borrowing the Clayton Act's four year limitations period for civil RICO claims. The court stated, however, that it had "no occasion to decide the appropriate time of accrual for a RICO claim." *Id.*, 486 U.S. at 156-157. This case directly addresses the unresolved issue of the correct rule of accrual of the statute of limitations in civil RICO cases where there is continuing criminal conduct causing damage.

In Holmberg v. Armbricht, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L. Ed. 743 (1946), this court decided that the doctrine of equitable tolling is read into every federal statute of limitation. The unresolved question squarely presented here is whether equitable tolling applies where Respondents have combined to actively conceal and cover up the underlying fraud, and have continued to affirmatively falsely promote and advertise the product to the customer, even though Petitioners

may not have acted with due diligence.<sup>4</sup>

### **A. Accrual of the Statute of Limitations in RICO Cases for Continuing Unlawful Conduct That is a Cause of Damage.**

#### **1. The accrual rules adopted by the circuit courts are in conflict.**

In the absence of guidance from the Supreme Court, the lower courts have adopted a variety of RICO accrual doctrines. An "injury discovery" accrual rule was adopted by the First, Second, Fourth, Fifth, Seventh, Ninth and D.C. Circuits. Rodriguez v. Banco Cent., 917 F.2d 664, 665 (1st Cir. 1990); Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1102 (2d Cir. 1988) *cert. den.*; Pocahontas Supreme Coal Co. v. Bethlehem Steel, 828 F.2d 211, 220 (4th Cir. 1987); LaPorte Const. Co. Inc. v. Bayshore Nat. Bank, 805 F.2d 1254, 1256 (5th Cir. 1986); McCool v. Strata Oil Co., 972 F.2d 1452, 1464-65 (7th Cir. 1992); Grimmett v. Brown, 75 F.3d 506, 510-11 (9th Cir. 1995); Riddell v. Riddell Washington Corp., 866 F.2d 1480, 1489-90 (D.C. Cir. 1989). The Third, Sixth, Eighth, Tenth and Eleventh Circuits have adopted an "injury plus pattern discovery" accrual rule, with the Third Circuit's approach being broader and involving a "last predicate act or injury" approach. Keystone Ins. Co. v. Houghton, 863 F.2d at 1130-31 (3d Cir. 1988); Caproni v. Prudential Securities, Inc., 15 F.3d 614, 619-620 (6th Cir. 1994); Granite Falls Bank v. Henrikson, 924 F.2d

<sup>4</sup> It is not disputed that the Petitioners did not know of the fraud. Whether Petitioners should have known of the fraud was hotly contested in the lower courts. The Petitioners presented evidence that they hired appropriate experts to help them with their investigation of the cause of problems on their farm, including veterinarians and nutritionists, and were not able to discover the fraud over the 16 years the Harvestore silo was in use. This investigation included contacts with the local dealer, who lied to them about the reason for the occasional presence of mold in the feed.



150, 154 (8th Cir. 1991); Bath v. Bushkin, Gaims, Gaines & Jonas, 913 F.2d 817, 820-821 (10th Cir. 1990); Bivens Gardens Office Bldg v. Barnett Bank, 906 F.2d 1546, 1553-54 (11th Cir. 1990). The latter rule has been criticized by other circuits. Compare Keystone Ins. Co. v. Houghton, with Granite Falls Bank v. Henriksen. In addition, some courts in both groups utilize a "separate accrual" rule, under which new predicate acts or injury can extend the statute of limitations. To date, some form of "separate accrual" rule has been adopted in the First, Second, Seventh, Eighth, Ninth, Tenth, and Eleventh circuits. See e.g. Rodriguez, 917 F.2d at 666; Bankers Trust Co., 859 F.2d at 1102; McCool, 972 F.2d at 1464-66; Granite Falls Bank, 924 F.2d at 154; Bath, 913 F.2d at 820; Grimmett, 75 F.3d at 510-11; Bivens, 906 F.2d at 1554-55. Predictably, the courts that have adopted the separate accrual rule do not agree in its application, bringing about unfair and inconsistent results. Some courts require "new and independent injury", but only when there are no new predicate acts. Some courts (such as the circuit court here) require new and independent injury even where there are new predicate acts. The courts also differ on what constitutes "new and independent" injury.

Petitioners urge this court to adopt the "last predicate act" rule of Keystone. If this Court rejects Keystone and instead adopts a "separate accrual" rule (where each new predicate act causing injury gives rise to a new claim, but doesn't revive old claims), then Petitioners urge this Court to reject the corollary enunciated by the Eighth Circuit in this case that each new predicate act must also be accompanied by independent injury to avoid the bar of the statute of limitations.

- a. The Court should delay action on this Petition until Grimmett v. Brown is decided.

Recently, this court accepted certiorari in a case from the

Ninth Circuit to address the obvious conflict in RICO accrual law. See Grimmett v. Brown, 75 F.3d 506 (9th Cir. 1995), cert. granted, 64 U.S.L.W. 3830 (June 18, 1996). The ruling of this Court in Grimmett v. Brown will likely affect the outcome in this case. The circuit court in Grimmett discussed the separate accrual rule and equitable tolling. The amici in Grimmett have urged adoption of the Keystone approach to accrual. Petitioners here urge the Court to clarify accrual law in Grimmett by adopting the Keystone rule, as it best represents the remedial purpose of the statute. See separate briefs on appeal of National Association of Securities and Commercial Law Attorneys (NASCAT) in Support of Petitioners and Plaintiffs Executive Committee, MDL No. 1069, and David L. Forbes Supporting Reversal.

Because there is significant likelihood that this Court's decision in Grimmett will impact this case, Petitioners request that the court hold this case in abeyance until Grimmett is decided. See, Stern, et al, Supreme Court Practice (7th Ed, 1993) p. 358, citing United States v. American Broadcasting-Paramount Theaters, Inc., 383 U.S. 906 (1966) (ruling on certiorari delayed, and later denied). If this Court adopts the last predicate act rule of the Third Circuit, or clarifies the necessity of a "new and independent injury" under the separate accrual rule, the result in this case will be affected. The Court can then either remand to the Eighth Circuit for further proceedings consistent with this Court's decision in Grimmett or rule on this Petition.

- b. The Court should grant certiorari in this case.

If this court does not provide a comprehensive rule concerning accrual in Grimmett, then certiorari should be accepted in this case to consider the best rule of accrual for new

predicate acts occurring within the statute of limitations. As noted above, conflict remains between the circuits as to whether a separate accrual rule should be based upon the "last predicate act" and whether new overt acts revive claims for past predicate acts.

Many of the federal circuits have adopted the separate accrual rule for RICO claims under which a new claim accrues for continuing violations of the law, triggering a new four year limitations period, each time the Plaintiff discovers, or should have discovered, the operative event triggering accrual (that is, either injury or injury plus a pattern of racketeering activity). *Supra*, discussion at p. 12. This rule has various mutations, requiring guidance from this Court. See *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-66 (7th Cir. 1992) (discussing differing accrual rules, and stating "each wrongful act that causes injury is a new cause of action..."); *Bath v. Bushkin, Gaims, Gaines, & Jonas*, 913 F.2d 811, 820 (10th Cir. 1990) (discussing separate accrual rule where knowledge of pattern required); Humes, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399, 1412, n. 85 (1990) (criticizing the separate accrual rule); Hackenberg, *Accrual of Civil RICO Claims*, 48 La.L. Rev. 1411, 1414 (1988).

The Second, Third, Ninth (in *Grimmett*) and now the Eighth Circuit in this case have adopted a "new and independent" injury precondition for separate accrual of RICO claims. *Bingham v. Zolt*, 66 F.3d 553, 559 (2d Cir. 1995); *Glessner v. Kenny*, 952 F.2d 702, 707-708 (3d Cir. 1991) (requiring a new and independent injury only when there are no new predicate acts within 4 years of bringing suit). The Eighth Circuit rule as applied to a case involving continuing and accumulating injury would permit a RICO defendant, such as the Respondents here, to perpetrate a fraud and, once the limitations period runs on the original fraud, to continue to perpetrate fraudulent acts and cause further injury, which

conduct is then protected from suit by the statute of limitations as long as the injuries flowing from the new acts of fraud are not "independent," i.e. qualitatively different from the previous injuries. In the present case, this means that the Petitioners, who were originally defrauded in 1974 in the sale of the silo, cannot sue the Respondents for the new fraudulent acts which occurred in the fall of 1989 and which caused further injury at that time, because the statute of limitations has run on the 1974 fraud. In other words, Petitioners' statute of limitations for the 1989 predicate acts and any continuing injuries ran out before those acts and injuries even took place. This is a radical departure from the intent of the RICO statute, which is to prevent continuing pattern criminal conduct. This rule effectively insulates and encourages such unlawful conduct, an anomalous and indefensible result.

The question is whether the 1989 predicate acts were a *substantial contributing cause* of the injuries occurring thereafter, but not necessarily the *sole cause*. Restatement (Second) of Torts §546 (discussing causation in the context of fraud) and comment b ("It is not, however, necessary that his reliance upon the truth of the fraudulent representation be the sole or even the predominant or decisive factor in influencing his conduct. It is not even necessary that he would not have acted or refrained from acting as he did unless he had relied on the misrepresentation. It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.") Both the pre-sale and post-sale ads were a *cause* of injury to the Petitioners in later periods. Therefore, attempting to identify either a single source of injury or requiring that the injuries be different in kind or quality only clouds the question. The simple issue is whether the later predicate acts were a contributing cause of some injury. If so, a new claim is created which has its own statute of limitations.



2. The decision of the Eighth Circuit is erroneous.

The separate accrual rule, as first contemplated by then Judge Kennedy in his concurrence in State Farm Mut. Auto. Ins. Co. v. Ammann, 828 F.2d 4 (9th Cir. 1987) provided as follows:

The rule is that a cause of action accrues when *new overt acts occur* within the limitations period, even if a conspiracy was formed and other acts were committed outside of the limitations period. A corollary rule is that damages may not be recovered for injuries sustained as a result of acts committed outside of the limitations period. (Italics added).

The "new and independent" injury requirement of separate accrual for RICO claims began as a reaction to the breadth of the Third Circuit's "last predicate act or injury" rule in Keystone Ins. Co. v. Houghton, supra. In Keystone, the court held that either a new act or a new injury occurring within the limitations period rendered timely an otherwise time-barred RICO claim. In that case, as in this one, there was an additional predicate act and injury within the four year period. The Keystone rule states:

The limitations period for a civil RICO claim runs from the date the Plaintiff knew or should have known that the elements of the civil RICO cause of action existed unless, as a part of the same pattern of racketeering activity, there is further injury to the Plaintiff or further predicate acts occur, in which case the accrual period shall run from the time the Plaintiff knew or should have known of the last injury or the last

predicate act which is part of the same pattern of racketeering activity. 863 F.2d at 1130.

In Glessner v. Kenny, 952 F.2d 702 (3d Cir. 1991), there was additional injury within the limitations period, but no new predicate act. In that case, the court first established the "new and independent" injury requirement, purportedly relying on decisions from the Second and Eleventh Circuits. Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (2d Cir. 1988), cert. den. 490 U.S. 1007 (1989); Bivens Garden Office Bldg v. Barnett, 906 F.2d 1546, 1555 (11th Cir. 1990). While neither Bankers Trust nor Bivens Gardens stand for a requirement of *qualitatively* different damages, both the Eighth Circuit (in this case, where there were new predicate acts<sup>5</sup> and more injury within four years) and the Ninth Circuit (in Grimmett) now require such evidence to avoid the bar of the statute of limitations. The Eighth Circuit rule adopted in this case goes much further than the rule in Glessner, because it requires the Petitioner to show new and independent injury even when there are new predicate acts within the statute of limitations.

This new rule creates in the tortfeasor/criminal a license to continually injure RICO victims once the original statute of limitations is past. Since the whole purpose of RICO is to eliminate *pattern* criminal conduct, the intent of the law will be perverted and largely nullified by placing the Courts in the dubious position of protecting RICO violators who are rendered immune from suit after the passage of the four year limitations period. Because the continuing *pattern* conduct is likely to be

5 In this case, there were new advertisements relied upon by the Plaintiffs in the fall, 1989 Harvestore Farmer magazine and an October 25, 1989 ad in Hoards Dairyman, a national farm publication. App. F. Plaintiffs alleged injury flowing from these fraudulent advertisements. As noted above, this does not mean that there were not other causes of the same injury, including the fraud perpetrated before the sale. See discussion, supra at 15.

the same, the *injuries* resulting from the conduct are often the same.

To use the example cited in the Supreme Court's opinion in H.J. Inc. v. Northwestern Bell Tel., 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989), if a RICO violator collected protection payments from merchants for more than four years, the RICO violator would have a complete limitations defense for his acts, even though payments were extracted within the four year period prior to suit. By requiring a RICO plaintiff to establish an "independent injury" i.e., that the original fraud played no part in the later injury or that the later injury was qualitatively different from the first injury, courts effectively authorize RICO violators to continue their past predicate acts and resulting damages into the future without the risk of incurring RICO liability. This makes no sense, especially when one considers that the majority of courts have ruled that a civil RICO plaintiff cannot seek injunctive relief under RICO. See, e.g., Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986). Like any other civil plaintiff, a RICO plaintiff may decline to bring suit against a defendant for a long time for prudent reasons, including the risk and cost of litigation, the attendant publicity or notoriety, and the likely response of a defendant. There is little to recommend the contention that a plaintiff who delays bringing a RICO claim until after the expiration of the four year limitations period is barred forever from instituting suit based upon injuries inflicted thereafter by criminal acts of the defendant simply because they are the same type as previously suffered, or because the original predicate act was a part of the cause of those injuries.

Petitioner's argument is in accord with the liberal construction policy espoused by the drafters of RICO. RICO states that "the provisions of this title shall be liberally construed to effectuate its remedial purpose." Racketeer Influenced and Corrupt Organization Act, Ch 96, §904(a), 84 Stat. 947 (1970),

note following 18 U.S.C. §1961. "The statute's remedial purposes are nowhere more evident than in the provision of a private action for those injured by racketeering activity," Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985). The language of the statute, as well as "Congress' self consciously expansive language and overall approach," mandate that RICO be read broadly. The Eighth Circuits' requirement of an independent injury is directly opposed to the remedial purposes of the statute.

**B. Continuous False Advertising and Active Concealment of Fraud Should Equitably Toll the Statute of Limitations in a Civil RICO Case.**

**1. The circuit court's application of the federal equitable tolling doctrine conflicts with the rule in the Second and Seventh Circuits.**

Petitioners specifically plead fraudulent concealment coupled with continuing active fraud in the Amended Complaint. App. G-14 to G-35. The issue raised here is whether the Petitioners need to prove due diligence in discovering the fraud underlying the predicate acts where the Respondents have engaged in active concealment of the fraud while, at the same time, continuing to fraudulently promote the use and repair of the product to the consumer. The circuit court in this case did not address the claim of fraudulent concealment as a basis for federal equitable tolling except to conclude that, "the Klehr's failure to act with due diligence precludes the application of this doctrine." App. A-17, f.n. 11.

A conflict exists between the rule applied by the circuit court in this case and the rule applied in the Second and Seventh Circuits. Robertson v. Seidman & Seidman, 609 F.2d 583, 593 (2d Cir. 1979); Sperry v. Baggren, 523 F.2d 708, 711 (7th Cir.



1975). In these circuits, the plaintiff must prove due diligence only when the defendant is involved in "passive" concealment, i.e. where the defendant takes no further steps to disguise the fraud from the plaintiff. Clute v. Davenport Co., 584 F. Supp 1562, 1578 n.4 (D. Conn. 1984). The D.C. Circuit has attempted to reconcile these differences. Hohri v. United States, 782 F.2d 227, 248, n. 54 (D. C. Cir. 1986); Riddell v. Riddell Washington Corp., 866 F.2d 1480, 1491 (D.C. Cir. 1989). According to these cases, if there is fraudulent concealment, the defendant has the burden of proving something closer to actual notice to set the statute running. The deceptive conduct "may be as simple as a single lie." Riddell v. Riddell Washington Corp., *supra*, 866 F.2d at 1491.

According to the Eighth Circuit, equitable tolling is never even a consideration where it can otherwise be determined there was a lack of due diligence. In other words, the Respondent's continuing fraud can be ignored if the Petitioners are negligent in discovering the original fraud. Moreover, the Eighth Circuit refused to even consider fraudulent concealment of the original fraud or continuous fraudulent advertisement of the product as relevant factors in determining whether Petitioners exercised due diligence. Under the Eighth Circuit's reasoning, the merest inquiry notice (that there "might be a possible fraud") triggers the statute, which cannot thereafter be stopped by a party's fraudulent concealment or other overt acts that effectively "lull" the plaintiff into taking no action. Not even the burden of proof is shifted. The facts in the record undeniably lead to a different result depending only on the plaintiff's selected forum. The Supreme Court should reconcile this difference in application of the equitable tolling doctrine.

If this Court rejects the Keystone rule in Grimmett, it will be particularly important for the Court to address equitable tolling in the RICO context. Plaintiffs in RICO cases will be faced with the loss of meritorious claims, and defendants will be

encouraged to cover up their fraud until the 4 year limitations period is past. The lower courts will be faced with numerous claims of tolling, and need the guidance of this Court regarding the correct rule to apply.

## **2. The decision of the Eighth Circuit is erroneous.**

The Petitioners in this case were continually duped, over the many years they owned the silo, into believing it was the "cadillac" of silos. There was a continuous barrage of "after sale" merchandising which had its intended effect. At the same time that this after sale campaign was convincing the Petitioners to look elsewhere on their farm for the source of their injury, the Respondents were continuing to engage in product research which established the falsity of the marketing campaign. This scientific research was actively concealed, and marked secret and confidential. Instead of publishing their own damning research as promised in the advertising, the Respondents published favorable empirical research from university professors who were also kept in the dark about the infirmities of the silo.

There is a stark contrast between a tortfeasor who, on the one hand violates the law and thereafter stands mute, and another tortfeasor who, after committing the original fraud, perpetrates additional fraud while, at the same time, actively concealing the original fraud. Such persons should, in equity, be treated differently. The former may justifiably take advantage of the "due diligence" principle which requires the plaintiff to act or lose his claim. The latter, because of his continuing violation, should suffer a penalty regardless of whether his victim has acted with due diligence. The continuing tortfeasor should have the burden of proving that the plaintiff actually knew of the fraud. This is a reasonable price to pay for the continued

criminal conduct. The rule of the Seventh and Second Circuits is a better rule of law and should be adopted by the Supreme Court in civil RICO cases.

### **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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### **APPENDIX**

A. Opinion of Court of Appeals.....	A-1
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No. 95-1355

- \* Appeal from the United
- \* States District Court for
- \* the District of
- \* Minnesota.

**Movant.**

Submitted: October 18, 1995

Filed: June 6, 1996



Before FAGG, HEANEY, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

Marvin Klehr and Mary Klehr (Klehers) appeal from the district court's<sup>1</sup> entry of summary judgment against them on their various Minnesota state law and Racketeer Influenced and Corrupt Organizations Act ("RICO") claims. These claims are premised upon alleged misrepresentations made by defendant A.O. Smith Harvestore Products, Inc., a subsidiary of defendant A.O. Smith Corporation (collectively "AOSHPI"), and AOSHPI's authorized local dealer, MVBA Harvestore Systems, concerning a Harvestore silo that the Klehres purchased. The district court ruled that the Klehres' claims were barred by the statute of limitations. Klehr v. A.O. Smith Corp., 875 F. Supp. 1342 (D. Minn. 1995). We affirm.

I.

The Klehres operate a dairy farm in Minnesota. In approximately 1974, they purchased a Harvestore silo manufactured and marketed by AOSHPI and sold by MVBA. Richard Deutsch, a salesman for MVBA, provided the Klehres with information about Harvestore silos before and after the Klehres purchased the Harvestore, and he also served as their local contact when they had problems with the unit.

The fulcrum for the Klehres' claims relates to certain representations made by AOSHPI concerning a Harvestore silo's unique "oxygen limiting" feature. Marvin Klehr was an experienced dairy farmer and knew that mold and spoilage in

<sup>1</sup> The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

livestock feed are caused due to the feed's exposure to oxygen, and that moldy and spoiled feed would be harmful to his dairy herd if fed to it. According to the Klehres, AOSHPI represented that because the Harvestore silos were sealed, feed stored in the unit would have almost no exposure to oxygen, thereby virtually eliminating problems with moldy or spoiled feed.<sup>2</sup> This would result in higher feed quality, which in turn would eliminate the need to add protein supplements to the herd's daily feed ration. It would also improve the health of the herd and increase milk production at a rate of three to five pounds of milk per cow per day. All of these purported benefits would ultimately increase the profitability of the Klehres' dairy operation. Although a Harvestore silo was considerably more expensive than a conventional stave silo, which the Klehres also considered purchasing, it was explained to the Klehres that Harvestore's unique "oxygen limiting" feature justified the higher cost of the unit and that the unit would pay for itself in four to five years. The Klehres recognized, however, that all of the promised virtues of a Harvestore unit hinged upon the efficacy of the structure's "oxygen-limiting" feature.

Despite AOSHPI's representations, the Klehres experienced a myriad of problems after the Harvestore unit was installed. In July and August of 1976, Marvin Klehr observed white chunks of mold in the haylage<sup>3</sup> he removed from the unit. He contacted Deutsch, who assured him that the mold was normal and simply the product of a minute quantity of oxygen that entered the top hatch of the unit when

<sup>2</sup> Some of AOSHPI's promotional materials apparently likened a Harvestore silo to a giant sealed fruit jar.

<sup>3</sup> "Haylage" in the context of this case refers to chopped alfalfa silage stored in a silo at a designated moisture content to promote fermentation.



it was being filled.<sup>4</sup> Deutsch explained that the Klehrs could expect a thin layer of mold each time the Harvestore was filled because of the small amount of oxygen that would flow into the unit during the filling process. The Klehrs accepted this explanation.

In the spring of 1977, Marvin Klehr again noticed chunks of mold in the feed and also observed that the feed had become unusually dark brown and smelled musty. Marvin Klehr loaded the spoiled feed into a manure spreader and dumped it on one of his fields. Marvin Klehr made the same observations in the spring of 1978 and undertook the same action. This process was repeated each spring, with the amount of moldy or spoiled feed always ranging from one to two manure spreader loads.<sup>5</sup>

The Klehrs' dairy herd also began suffering from various health problems after the Klehrs started feeding the herd haylage stored in the structure. Some of the health problems had not previously afflicted the herd, while other maladies began occurring with much greater frequency. These ailments included: displaced abomasums or "twisted stomachs," "foot problems," swelling and bruises around the

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<sup>4</sup> A Harvestore silo is filled through an open hatch at the top of the structure and unloaded by way of a chain-type unloader at the bottom of the unit. During the unloading process, so-called "breather bags" at the top of the silo expand to prevent oxygen from entering.

<sup>5</sup> The only exception to this process was that in approximately the spring of 1982, Marvin Klehr noticed a much greater quantity of moldy and spoiled feed than he had previously observed. The feed was much darker brown and contained significantly more and larger chunks of mold. He immediately ceased feeding his dairy herd feed from the Harvestore unit and subsequently emptied approximately 12 manure spreader loads of spoiled feed from the unit. Deutsch and AOSHPI officials later made repairs to the unit. Thereafter, the process returned to what it had previously been -- one to two manure spreader loads of spoiled or moldy feed emptied from the unit each spring.

joints in the cows' hind legs, cows "going off feed," unusually thin and unthrifty cows, cows having rough hair coats and dull eyes, a higher rate of uterine infections, and more diarrhea and digestive problems than normal. Further, the Klehrs' herd began having certain breeding and reproductive problems, such as poor conception rates, longer calving intervals, and spontaneous abortions.

Additionally, the Klehrs never realized the numerous benefits AOSHPI represented the Harvestore unit would provide, namely, an increase in milk production, elimination of protein supplements, and ultimately, an increase in profitability of the dairy operation. In fact, although their dairy operation had been profitable prior to their purchase of the Harvestore, the Klehrs experienced financial hardship after they started using the Harvestore. Despite all of this, the Klehrs never questioned Deutsch about the inability to eliminate protein supplements or the lack of increase in milk production or profitability until 1990. The Klehrs did consult a number of nutritionists and veterinarians during the years after they purchased the Harvestore concerning several of the herd's health and reproductive problems, but they never asked these consultants whether the Harvestore could have been the source of the problems. Finally, the Klehrs did not examine records which they possessed which would have illustrated to them that their herd's milk production was below that of other local herds and that the herd's milk production and the profitability of the dairy operation had not increased since the Harvestore was installed.

In 1991, Marvin Klehr saw an article in a Minneapolis, Minnesota, newspaper regarding a claim concerning a Harvestore unit that had been made against AOSHPI in Minnesota state court. Marvin Klehr subsequently contacted a University of Minnesota veterinarian, Dr. William Olson, about a health problem with his herd; in April of 1991, Dr. Olson visited the Klehrs' farm. Dr. Olson and Marvin Klehr

subsequently looked inside the Harvestore and observed large amounts of moldy and spoiled feed. This was the first time that Marvin Klehr had looked inside the Harvestore unit when feed was still being stored in the unit.

The Klehrs later commenced this action on August 27, 1993, alleging Minnesota common law fraud and negligent representation claims, violations of certain Minnesota consumer statutes, and violations of RICO. AOSHPI moved for summary judgment on each claim arguing, inter alia, that the claims were barred by the statute of limitations. The district court granted AOSHPI's motions. Klehr, 875 F. Supp. at 1345. The Klehrs appeal.

## II.

We review de novo the district court's grant of summary judgment. Maitland v. University of Minn., 43 F.3d 357, 360 (8th Cir. 1994). Summary judgment is appropriate if the record, when viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

### A.

We turn our attention first to the Klehrs' Minnesota common law fraud claims, which are governed by a six-year statute of limitations. See Minn. Stat. Ann. § 541.05(6) (West 1988).<sup>6</sup> Under this statute, the cause of action accrues, thereby triggering the limitations period, upon "the discovery by the aggrieved party of the facts constituting the fraud." Id.

<sup>6</sup> With respect to these claims, we review de novo the district court's interpretation of Minnesota law. Michalski v. Bank of America Arizona, 66 F.3d 993, 995 (8th Cir. 1995).

The Minnesota Supreme Court has construed this statute as imposing a standard of objective reasonableness upon a plaintiff to discover the facts constituting the fraud. Bustad v. Bustad, 116 N.W.2d 552, 555 (Minn. 1962). "[T]he facts constituting the fraud are deemed to have been discovered when, with reasonable diligence, they could and ought to have been discovered." Blegen v. Monarch Life Ins. Co., 365 N.W.2d 356, 357 (Minn. Ct. App. 1985) (quotations omitted). "A plaintiff must exercise reasonable diligence when he or she has notice of a possible cause of action for fraud." Buller v. A.O. Smith Harvestore Prods., Inc., 518 N.W.2d 537, 542 (Minn. 1994). A "party need not know the details of the evidence establishing a cause of action, only that the cause of action exists" in order for the limitations period to commence. Id. (quoting Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 919 (Minn. 1990)). A failure to actually discover the fraud will not toll the limitations period if such a failure is inconsistent with this reasonable diligence standard. Blegen, 365 N.W.2d at 357.

The Klehrs bear the burden of showing that they did not, and that with reasonable diligence they could not, discover the facts constituting the fraud earlier than August 27, 1987, six years prior to the time this action was filed. Id. A plaintiff's due diligence in the statute of limitations context is ordinarily a question of fact. Hines v. A.O. Smith Harvestore Prods., Inc., 880 F.2d 995, 999 (8th Cir. 1989). Where the evidence leaves no room for reasonable minds to differ on the issue, however, the court may properly resolve the issue as a matter of law. Miles v. A.O. Smith Harvestore Prods., Inc., 992 F.2d 813, 817 (8th Cir. 1993).

The Klehrs argue that they did not become aware of the facts constituting the fraud until April of 1991, when Marvin Klehr, accompanied by Dr. Olson, looked inside the silo for the first time during feed storage and observed large amounts of mold in the feed. The Klehrs submit that they questioned



Deutsch about the presence of mold and spoilage in the feed and that at various times they consulted numerous veterinarians and nutritionists concerning the health and reproductive problems that their dairy herd was experiencing. Based on these actions, the Klehrs assert that a fact question exists concerning whether they exercised reasonable diligence to determine the facts constituting the fraud. We disagree.

Shortly after they began using the Harvestore unit to store haylage, the Klehrs encountered problems that were directly contrary to AOSHPI's representations concerning the benefits a Harvestore unit would provide. AOSHPI represented to the Klehrs that using a Harvestore to store feed for their dairy herd would virtually eliminate problems with moldy and spoiled feed. However, beginning in July of 1976 and continuing each subsequent year, Marvin Klehr observed mold in the feed which had been extracted from the unit; further, beginning in the spring of 1978, Marvin Klehr annually emptied one to two manure spreader loads of moldy or spoiled feed from the unit. Further, contrary to AOSHPI's representations of improved herd health, herd health actually deteriorated. The herd also began experiencing heretofore unencountered breeding and reproductive problems. The Klehrs consulted with a number of nutritionists and veterinarians over the years, but they never asked any of these consultants whether the feed fed from the Harvestore silo could have been the source of the herd's health and reproductive problems.

Similarly, it was represented to the Klehrs that one of the chief virtues of a Harvestore was that it would dramatically improve the quality of the feed such that protein supplements would become unnecessary; the Klehrs, however, were never able to reduce or eliminate protein supplements to the herd's daily feed ration. In addition promises of increased milk production and profitability of the dairy operation went unfulfilled; in fact, while the Klehrs' dairy operation had been

profitable prior to the purchase of the Harvestore, thereafter the Klehrs experienced financial hardship because the dairy profits were not large enough. The Klehrs failed to examine records in their possession which would have indicated to them that the Harvestore unit was not delivering the promised increases in milk production and profitability, and that the herd's milk production was subpar compared to other local dairy herds. The Klehrs did not question Deutsch or AOSHPI officials until 1990, some 16 years after putting the Harvestore to use, about the lack of an increase in milk production and profitability of the dairy operation, and the inability to eliminate protein supplements from the herd's daily feed ration.

The Klehrs assert that health or reproductive problems in a dairy farming operation can be caused by a myriad of factors inherent in dairy farming and therefore determining the precise source of the problem is impossible. Setting aside the other promised benefits concerning the Harvestore which never came to pass (moldy and spoiled feed, inability to eliminate protein supplements), in this case the Klehrs' herd suffered numerous health and reproductive problems shortly after the Klehrs started to feed the herd haylage stored in the Harvestore unit. After encountering these problems, the Klehrs were on notice of a possible cause of action for fraud and were required to conduct a reasonably diligent investigation -- perhaps by inspecting the silo during feed storage (which they did for the first time in 1991 and observed the prevalence of mold), by questioning Deutsch or AOSHPI representatives concerning why the dairy operation was not profitable, or by asking a veterinarian or nutritionist whether the Harvestore could be the source of the problems. Their failure to do so is simply inconsistent with Minnesota's inquiry notice standard, under which plaintiffs are required to exercise reasonable diligence to discover the facts which may constitute the fraud. We hold that, as a matter of law, the Klehrs, by

exercising reasonable diligence, should have discovered the facts constituting the alleged fraud prior to August 27, 1987.

This case is distinguishable from our holding in Hines, where we were called upon to decide whether the Missouri statute of limitations barred the plaintiffs' common law fraud claims in connection with several Harvestore silos. 880 F.2d at 995. We held in Hines that a factual dispute existed concerning when the plaintiffs' cause of action accrued under Missouri law because there was a conflict in the evidence concerning when the plaintiffs should have known that the Harvestore silos were not operating as AOSHPI represented. Id. at 998. Notwithstanding Hines, our analysis in this case, which concerns Minnesota state law claims, is governed by the teachings of the Minnesota Supreme Court concerning the interpretation and application of that state's discovery accrual rule; of particular import is that court's recent decision in Buller, which, like this case, involved the application of the statute of limitations involving a claim of fraud in connection with a Harvestore silo. Our analysis is also guided by the Minnesota federal district court's holding in Veldhuizen, wherein that court addressed the precise issues in front of us in another case involving a Harvestore silo. The analysis expounded in these cases makes clear that the Klehrs' cause of action accrued long before August 27, 1987. Thus, our Hines decision, in which we were called upon to interpret Missouri's discovery rule, is not controlling here.

In any event, to the extent that Hines applies, there we relied upon evidence that water had leaked into the Harvestore due to cracks in the structure and had possibly come into contact with the feed stored within; thus, the plaintiffs would have been unable to determine whether the silo, if it had been properly sealed, nevertheless could not live up to AOSHPI's representations that moldy and spoiled feed would be eliminated. The Klehrs, however, have made no similar showing that their silo had cracks that may have permitted

water to come into contact with the stored feed, and which would create a question of fact as to the cause of the moldy or spoiled feed.<sup>7</sup>

The Klehrs also contend that the statute of limitations did not commence until they were aware that the Harvestore unit had a design defect that prevented it from performing as represented. Such a standard, however, is wholly inconsistent with the Minnesota Supreme Court's teaching that the requirement of reasonable diligence imposes an affirmative duty to investigate upon a party who is aware of facts that might constitute a possible cause of action for fraud. Buller, 518 N.W.2d at 542; Hydra-Mac, 450 N.W.2d at 919 ("A party need not know the details of the evidence establishing the cause of action, only that the cause of action exists."). We find persuasive the following statement from Veldhuizen, where the court addressed this precise issue: "The limitations period does not wait to run until the [plaintiffs] were able to make a causal connection between the failure of the silo to perform as promised and a particular design defect." Veldhuizen v. A.O. Smith Corp., 839 F. Supp. 669, 676 (D. Minn. 1993). Thus, we reject the Klehrs' argument that the limitations period did not commence until they were able to pinpoint the design flaw that prevented the Harvestore from performing as represented.<sup>8</sup>

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<sup>7</sup> Both parties cite a number of cases from other jurisdictions dealing with the Harvestore litigation. See, e.g., Horn v. A.O. Smith Corp., 50 F.3d 1365 (7th Cir. 1995); Mohr v. A.O. Smith, et al., 1994 WL 178111 (E.D. Mich.); Nelson v. A.O. Smith Harvestore Prod., Inc., No. 86-4230-R (D. Kan. 1990); Johnston v. AgriStor Credit Corp., Civ. No. 84-4421-S (D. Kan. 1987). While we find the analysis of these courts to be somewhat helpful, again our analysis is governed by the Minnesota Supreme Court's interpretation of Minnesota's discovery accrual rule applicable to fraud claims.

<sup>8</sup> Likewise, we reject as meritless the Klehrs' assertion that their "failure to realize non-actionable predictions of future performance" did



B.

The Klehrs contend that AOSHPI fraudulently concealed their fraud cause of action and therefore the statute of limitations should be tolled. "Fraudulent concealment 'tolls the statute of limitations until the party discovers, or has a reasonable opportunity to discover, the concealed defect.'" Buller, 518 N.W.2d at 542 (quoting Hydra-Mac, Inc., 450 N.W.2d at 918). The limitations period is tolled, however, "only if it is the very existence of the facts which establish the cause of action which are fraudulently concealed." Hydra-Mac, Inc., 450 N.W.2d at 918-19. "Merely establishing that a defendant had intentionally concealed the alleged defects is insufficient; the claimant must establish that it was actually unaware that the defect existed before a finding of fraudulent concealment can be sustained." Id. Further, "there must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action" for fraudulent concealment to apply. Wild v. Rarig, 234 N.W.2d 775, 795 (Minn. 1975) (quoting 54 C.J.S. Limitations of Actions § 206f). The Klehrs bear the burden of showing that AOSHPI concealed the fraud and that the concealment itself could not have been discovered sooner by exercising reasonable diligence. Buller, 518 N.W. 2d at 542-43.

The Klehrs contend that material fact issues remain concerning whether AOSHPI knew that the Harvestore silos

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not trigger the statute of limitations. (Klehre's brief at 21.) The problems the Klehrs actually experienced shortly after they started using the Harvestore should have put them on notice that AOSHPI's representations concerning the unit were false, regardless of whether other performance benefits would have been independently actionable. While the Klehrs may not have been required to immediately file suit when they realized the representations were not true, they were required to conduct a reasonable further investigation, which, as we have outlined in detail, they failed to do.

were defective and deliberately concealed the defects from them through oral representations, written materials sent to Harvestore owners, and promotional meetings which the Klehrs attended. The Klehrs also contend that suggestions made by Deutsch and representatives of AOSHPI concerning methods to improve the dairy operation served to conceal the defects from them. According to the Klehrs, these misrepresentations prevented them from discovering the fraud, and accordingly the statute of limitations should be tolled during the period these continuing misrepresentations were made.

These arguments are unpersuasive quite simply because the Klehrs have made no showing that AOSHPI affirmatively concealed from them the existence of facts which would have supported their cause of action for fraud. As chronicled in detail above, the Klehrs were aware as early as 1976, when Marvin Klehr saw mold in feed taken from the Harvestore, that the silo was not performing as promised. The oral and written representations the Klehrs rely on to support their fraudulent concealment argument did not, and indeed could not, prevent them from discovering that AOSHPI's promises concerning the virtues of a Harvestore unit did not come to pass. See Miles, 992 F.2d at 816 (rejecting claim of fraudulent concealment in connection with Harvestore because of impossibility for defendants to conceal facts giving rise to cause of action when the evidence was in the plaintiff's own yard); Veldhuizen, 839 F. Supp. at 675 ("providing the [plaintiffs] with the post-sale materials does not rise to the level of affirmative concealment necessary to toll the statute of limitations."). Id. See also Buller, 518 N.W. 2d at 543 (rejecting fraudulent concealment claim based on post-sale advertising materials because plaintiff knew that Harvestore was not performing as represented). In short, the Klehrs' lack

of diligence precludes us from tolling the statute of limitations due to fraudulent concealment.<sup>9</sup>

### III.

The Klehrs argue that the district court erred by holding that their civil RICO claims were barred by the statute of limitations. Civil RICO claims are governed by a four-year statute of limitations. Association of Commonwealth Claimants v. Moylan, 71 F.3d 1398, 1402 (8th Cir. 1995). This circuit employs a discovery accrual standard to civil RICO claims; under this standard, such an action begins to accrue "as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern." Id. (inner quotes omitted)<sup>10</sup> The date when the injury and the pattern should have been discovered is subject to a standard of reasonableness, id., not unlike the standard for fraud claims outlined above. Thus, it is incumbent upon the Klehrs to show that it would not have been reasonable to discover the

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<sup>9</sup> We likewise reject the Klehrs' claims that, in the alternative, AOSHPI is equitably estopped from asserting the statute of limitations because of the repairs that were made to the Harvestore silo in approximately 1982. There is no evidence that AOSHPI represented that these repairs would cure the myriad of problems outlined above that the Klehrs had been experiencing. In any event, the Klehrs admit that after the repairs were made the same problems which they previously experienced continued. Thus, equitable estoppel is inapplicable in this case.

<sup>10</sup> The Klehrs assert a claim under 18 U.S.C. § 1962(a) for injury resulting from the reinvestment of income from the RICO enterprise in addition to their claim under 18 U.S.C. § 1962(c) based on a pattern of racketeering activity. The Klehrs contend that both claims are governed by the same discovery accrual rule, and we will assume, without deciding, that the same accrual rule applies to both causes of action.

existence, source, and pattern of their injury by August 27, 1989.

The Klehrs' RICO claims are premised on allegedly fraudulent advertising and promotional materials that they received through the mail from AOSHPI on a continuous basis before and after they purchased the Harvestore. The Klehrs claim that AOSHPI distributed similar materials to individuals throughout the United States during this period. They contend that these materials made the same fraudulent misrepresentations concerning the attributes and the benefits of Harvestore silos that they relied on in deciding to purchase their unit.

However, we agree with the district court that the facts which should have put the Klehrs on notice of a possible cause of action for fraud should also have alerted them to the existence, source, and pattern of the injury for their RICO claim. As noted above, the Klehrs knew or should have known shortly after purchasing the Harvestore that AOSHPI's representations concerning the silo's attributes were simply not coming true and thus should have recognized the existence and source of their injury. Likewise, given that the Klehrs received numerous promotional materials and advertisements in the mail before and after they purchased the silo, they should have known that the misrepresentations were part of a pattern of suspected racketeering activity. We believe that the Klehrs should have determined that the representations were part of a pattern of racketeering activity when they should have identified the Harvestore as the cause and source of their problems. See Agristor v. Financial Corp. v. Van Sickle, 967 F.2d 233, 241-42 (6th Cir. 1992) (stating in analogous case that "as a matter of law, [the plaintiff] should have determined that the representations were part of a pattern at the same time it should have discovered that the silos caused the alleged problems on the dairy farm.").



The Klehrs urge us to adopt "a separate accrual rule," which would permit them to recover damages for predicate acts that occur within the limitations period, even if their claim for similar damages caused by similar predicate acts outside of the four-year period are time-barred. In essence, then, the Klehrs request that we adopt the "last predicate act" accrual rule outlined by the Third Circuit in Keystone v. Houghton, 863 F.2d 1125, 1126 (3d Cir. 1988), or a variation thereof. However, in Granite Falls Bank v. Henrikson, 924 F.2d 150, 154 (8th Cir. 1991), we declined to adopt such an "open-ended" standard, observing that it was inconsistent with "the underlying policy of a statute of limitations requiring due diligence on the part of the plaintiff." 924 F.2d at 154. Instead, we adopted an approach under which a plaintiff has four years to bring his claim from the point in time that he knew, or in exercising reasonable diligence should have known, of the existence and source of his injury and that the injury was part of a pattern, or his RICO claims are forever barred. Id. The principles expounded in Granite Falls preclude us from adopting the standard that the Klehrs propose.

We likewise reject the Klehrs' related assertion that their RICO claims are revived because of the "continuing damage" they sustained into the limitations period through the continued use, operation, and repair of the Harvestore silo. Again, Granite Falls provides the governing principle: it makes clear that a civil RICO action accrues with respect to "each independent injury" to the plaintiff. 924 F.2d at 154. The Klehrs would have us hold that each advertisement or promotional material that was sent to them or that they observed constitutes a separate "injury." However, these injuries are not "independent injuries" because they are all of the same type, flow from the same source, and are part of one cognizable pattern of conduct AOSHPI's alleged misrepresentations regarding the Harvestore unit. We believe

that these separate, discrete "injuries" that the Klehrs identify are more appropriately categorized as one single, continuous injury that was sustained sometime in the 1970s and for which the limitations period commenced long before August 27, 1989. See Glessner v. Kenny, 952 F.2d 702, 708 (3d Cir. 1992) ("the mere continuation of damages into a later period will not serve to extend the statute of limitations."). Thus, the Klehrs' civil RICO claims are time-barred.<sup>11</sup>

#### IV.

We have examined the Klehrs' numerous other arguments and determine that they lack merit for the reasons given by the experienced district judge in his well-reasoned opinion. Accordingly, for the reasons enumerated above, we affirm the district court's grant of summary judgment to AOSHPI.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,  
EIGHTH CIRCUIT.

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<sup>11</sup> We reject the Klehrs' argument that federal equitable tolling principles save their claim from being barred by the statute of limitations. The Klehrs' failure to act with due diligence precludes the application of this doctrine. See Johnson v. United States Postal Service, 861 F.2d 1475, 1481 (10th Cir. 1988), cert. denied, 493 U.S. 811 (1989). See also Wilson v. United States Government, 23 F.3d 559, 561 (1st Cir. 1994) ("[f]ederal courts have allowed equitable tolling only sparingly.").



**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION**

Marvin Klehr and Mary Klehr,

Plaintiffs, Civil No. 3-94-424

v. **MEMORANDUM OPINION  
AND ORDER**

A.O. Smith Corporation and  
A.O. Smith Harvestore  
Products, Inc., Jointly and  
Severally,

Defendants.

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**INTRODUCTION**

This action arises out of plaintiffs Marvin and Mary Klehr's purchase of a Harvestore silo in July, 1974. Plaintiffs claim that Defendants misrepresented material facts with respect to the characteristics of the Harvestore silo, causing the Klehrs damage. Before the Court is Defendant A.O. Smith Harvestore Products, Inc.'s ("AOSHPI") motion for summary judgment on all of Plaintiffs' claims based upon the expiration of the applicable statutes of limitations. Defendants argue that the action is time-barred because Plaintiffs failed to commence their lawsuit until August 23, 1993, nineteen years after purchasing the silo. For the following reasons and based upon all records, files and proceedings herein, Defendant's motion for summary judgment will be granted.

**FACTUAL BACKGROUND**

**I. Plaintiffs' Purchase of the Harvestore Silo**

The Klehrs purchased a 25 x 80 foot Harvestore silo on July 15, 1974, and began to use it in the summer of 1975.<sup>1</sup> The Klehrs stored chopped alfalfa haylage and occasionally silage in the silo. Richard Deutsch, a salesperson for MVBA Harvestore Systems, sold the silo to the Klehrs. Deutsch supplied the Klehrs with literature and films representing the qualities and benefits of the Harvestore silos. The Klehrs claim that they purchased the Harvestore based upon the following representations:

1. That A.O. Smith Corporation was a one-hundred year old company that "backed" the product and that AOSHPI was twenty-five years old and had the backing of A.O. Smith.
2. That MVBA Harvestore Systems representatives were authorized Harvestore dealers and were the repository of all research regarding the Harvestore silos.
3. Because of a unique "oxygen-limiting" breather bag, no oxygen would contact the feed during storage, resulting in better feed quality;
4. Because oxygen would not contact the feed, there would be no spoiled and moldy feed from the Harvestore silo;
5. Because of the higher quality feed, Plaintiffs would have healthier cows, realize an increase in milk production of three to five pounds per cow per day, and be able to

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<sup>1</sup> In 1955, Marvin Klehr's father purchased a second Harvestore silo which has been in use on the Klehr farm from 1955 to the present. This silo is not part of the lawsuit.

significantly reduce or eliminate the protein supplements in their rations; and

6. Plaintiffs would realize more profits and as a result the silo would pay for itself in four to five years.

Marvin Klehr ("M.K.") Dep. at 149-169, 183, 611-12. All of the promised benefits stemmed from the oxygen-limiting feature, which constituted the most important factor in the Klehrs' decision to purchase the Harvestore silo over a cheaper stave silo. *Id.* at 761-62.

Prior to 1974, Marvin Klehr was an experienced farmer. He concedes that he knew before 1974 that exposure of feed to oxygen causes mold and spoilage and that feeding animals spoiled and moldy feed could harm the animals. *Id.* at 114-19, 124.

## II. Plaintiffs' Experience With the Harvestore Silo

### A. Feed Quality and Appearance

Defendants represented that because of the oxygen-limiting breather bag, no oxygen would contact the feed, yielding higher quality feed than conventional silos. Based on these representations, Plaintiffs did not expect to observe mold in feed stored in the Harvestore silo. *Id.* at 150-67, 611-12. Beginning in 1976, however, Klehr observed in the feed a few white chunks of mold, about the size of a spoon. Concerned about the mold, Klehr inquired of Deutsch as to the cause. Deutsch explained that the mold came from the top layer on the silo and was "normal." According to Deutsch, at the time of filling oxygen entered the silo long enough to cause "a little damage." Deutsch dep. at 293-95. Deutsch told Klehr to expect a light layer of mold between each filling. Klehr accepted Deutsch's explanation.

Klehr observed light layers of mold between layers and in the spring each of the following years thereafter. Klehr also noticed within weeks of each filling that the feed turned a

brown color and smelled like molasses. Klehr did not consider the change in color or odor significant, however, based upon Harvestore's advertising brochures. Advertisements for the silo described Harvestore haylage as "mildly-fermented, molasses-like feed." Ex. 1 to M.K. Aff. According to Harvestore, the fermented smell enticed the cows to eat a lot of the feed. Klehr, therefore, believed that the brown, molasses-smelling feed coming from the silo was normal.

In the spring of 1977, at the end of the feed from the 1976 harvest, Klehr again saw mold, ranging from the size of a quarter to the size of a half dollar, and noticed that the feed had turned much darker brown in color and smelled musty. M.K. Dep. at 297-99. Klehr loaded the spoiled feed into his manure spreader and dumped it in the field. Subsequently, each time Klehr emptied the silo he hauled about two spreader loads of spoiled feed out to the field. He considered one or two spreader loads insignificant. Klehr continued this practice of dumping about two spreader loads of spoiled, moldy feed in the field every spring thereafter. *Id.* at 349.

One spring, between 1979 and 1982, Klehr observed that the spoilage occurred earlier than usual; the feed became much darker brown and contained significantly more and larger chunks of mold. *Id.* at 311-12. Klehr immediately shut down the silo and stopped feeding that feed to the cows. He hauled approximately twelve spreader loads out to the field, as opposed to the usual two loads. *Id.* at 313. That year, Klehr spoke to Deutsch about the heavy spoilage. Deutsch and other MVBA representatives checked Klehr's silo and fixed a broken breather bag. They then pressure tested the silo and reported to Klehr that it was repaired. *Id.* at 319-20. Subsequently, the feed returned to "normal," requiring Klehr to dump one or two spreader loads when cleaning the silo in the spring.



## B. Herd Health

In the years following his purchase of the Harvestore, Klehr experienced numerous ailments with his herd. Around 1980, Klehr noticed that his herd began to have diarrhea and digestive problems, although it occasionally had suffered diarrhea, or "winter dysentery," in the past. M.K. dep. at 413. Beginning after 1975 the herd had problems with displaced abomasums, or "twisted stomachs." Klehr had not experienced this problem prior to 1975. He consulted his veterinarian, Dr. Klimmek, who advised Klehr that the feed was too finely chopped. Id. at 420-22. Dr. Klimmek did not indicate that the problem with the consistency of the feed was caused by the feed storage unit. Id.

In approximately 1983, Klehr noticed his cows "going off feed." The feed representative adjusted the rations to resolve this problem. The representative did not associate this problem with the silo; rather, Klehr believed he was feeding his cows too much. Id. at 416-19.

Klehr observed an increase in uterine infections beginning around 1980. Klehr recently had doubled the size of his herd from forty-five to ninety; even with the larger herd, however, the percentage of uterine infections significantly increased. Id. at 427. Klehr spoke to his feed salesmen about the problem several times. They concluded that the cows lacked "some type of vitamin." Id. The feed salesmen added Selenium in addition to vitamins A, D, and E to the diet. Id. at 429.

Also in 1980, the herd began to experience foot problems. Klehr's feed salesman added minerals to the rations to treat the problem. In about 1977 Klehr observed swelling and bruises around the joints on the cows' hind legs. He had never seen this condition prior to 1977. Klehr's veterinarians operated on some of the cows, but were unable to diagnose the cause. His veterinarians did not connect the leg problems to the Harvestore silos.

After 1975 Klehr also noticed that his cows were thin and unthrifty, their coats were rough and their eyes were dull. Id. at 440-41. Klehr's feed salesmen told him "they knew that these cows were still lacking something." Id. at 445-56. They advised Klehr to alter his ration so that the cows would get "a little bit more grain, or a little bit more feed." Id. at 444. Again, no one related the unthriftiness or the dull appearance to the Harvestore silo.

## C. Breeding and Reproduction

In the years after 1975, Klehr experienced significant breeding and reproduction problems with his herd. Although the problems occurred over a period of time and did not "hit him overnight," they increased subsequent to the purchase of the Harvestore. Klehr observed, for example, a problem with premature abortions. When asked when this problem began, Klehr stated, "It's been a long time. I guess looking back, maybe at the start of the Harvestore system, yes." M.K. dep. at 479. Klehr recalls his herd's conception rate during the years he used the Harvestore as "very poor," and he was "very dissatisfied with it." Id. at 535. The Dairy Herd Improvement Association ("DHIA") records, which Klehr received monthly during this time period, confirmed the poor conception rate. Klehr believed this problem had existed for ten years prior to filing his state court lawsuit in 1991. Id. at 535-36.

After purchasing the Harvestore, Klehr also observed long calving intervals compared to reported averages for Minnesota farmers. Id. at 464-65. Klehr investigated the reproduction problems with his veterinarians and feed salesmen, who increased vitamin E and Selenium in the rations. The veterinarians pregnancy tested the cows and told Klehr that some cows had cysts; none, however, indicated that the problems related to the silo.



#### D. Milk Production

Klehr testified that during the period he used the Harvestore silo, he believed he received the expected increase in milk production. M.K. Dep. at 384-89. Whenever Klehr noticed a decrease in milk production, he attributed the problem to factors other than the Harvestore silo. For example, Klehr believed that his increase in his herd from forty-five to ninety cows depressed the milk production. He also voluntarily reduced his production for eighteen months in accordance with a dairy diversion program. Finally, Klehr attributed any depression of milk production to his herd's health problems, such as the foot problems and uterine infections.

In contrast to his belief that he received the expected increase in milk production from Harvestore, Klehr determined, after reviewing the DHIA records, that his production "was not going anywhere over the years." Id. at 512. These DHIA records were available to Klehr monthly during the entire period he used the Harvestore silos. Id. at 513. Klehr did not complain about his milk production to anyone until 1990, when he told Deutsch that he should be producing more milk. Id. at 378-79.

#### F. Protein Savings

Contrary to Harvestore's representations that the silo would eliminate the need for protein supplements, Klehr at all times had to add protein to the rations. Id. at 699-701. Klehr inquired of Deutsch regarding his failure to realize protein savings. Deutsch explained that due to increased production in recent years, the cows required more protein. Id. at 713. Klehr testified that he believed the need to supplement the feed with protein was due to various reasons, such as the way he

was "putting up" his haylage or that his fields were not clean enough. Id. at 700-701.

#### G. Profitability

During the period he used the Harvestore silo, Klehr believed he was receiving the promised profits. M.K. dep. at 644. After filing the state court lawsuit, however, Klehr reviewed his DHIA records and determined that the representations of increased profitability were false. Id. at 511-12. Klehr received DHIA records outlining his profits the entire time he used the silo. Mary Klehr testified that Plaintiffs experienced extreme financial hardship from the early 1980's to 1991 or 1992 due to low milk production. Mary Klehr Dep. at 23, 104-106.

When asked about profits incurred or lost in specific years, Klehr testified:

At the end of the year, I had an enterprise of hogs, milk, crops, and who knows whatever else. It was all thrown into one kitty, and I never once thought it was because of my Harvestore not giving me the profit or not doing what it was supposed to. Could have been the bad hogs, or bad weather, bad crops . . . I farmed long enough that you cannot project ahead a whole year what you think you are going to get, because it never comes out that way. You take what the good Lord gives you.

Id. at 688-89.

#### III. Discovery of the Alleged Defect

Plaintiffs allege that Defendants continued to misrepresent to them the characteristics of the Harvestore silos after the purchase. They claim to have received fraudulent

representations in the mail from 1969-91, specifically twenty pieces of advertising before the purchase and thirty-eight pieces of advertising after the purchase. Amended Complaint ¶¶ 10, 15, 16.

Plaintiffs contend that A.O. Smith Corporation knew of the alleged design flaws in the Harvestore silo since the 1960's, but deliberately concealed the defects from consumers. Plaintiffs claim that Defendants' conduct in concealing the deficiencies in the silos while continuing to misrepresent their qualities, prevented them from discovering the defect in the Harvestore silo as the source of the problems with their herd.

In 1991, however, Klehr saw an article in a Minneapolis newspaper regarding a verdict against AOSHPI in Olmsted County, Minnesota. Shortly thereafter, Klehr contacted the University of Minnesota about a mastitis problem with his herd. The University referred Klehr to Dr. William Olson, a veterinarian and Ph.D. In April 1991, Olson visited the Klehr farm and looked inside the Harvestore silo. This was the first time Klehr had looked in the silo prior to unloading. They observed large amounts of mold. Klehr claims that at that point, in April 1991, he realized for the first time that he had been feeding his herd moldy feed for fifteen years and that the spoiled feed had caused his herd significant health problems. See M.K. Aff. ¶ 10; Olson Aff. ¶ 2A-B, 7.

Plaintiffs commenced this action on August 27, 1993, alleging: common law fraud (Counts I and II); violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (Counts III and IV); common law negligent misrepresentation (Count V); and violations of Minnesota Statute sections 325F.67, 325F.68-70, 325D.13, 325D.44 (Counts VI-IX).<sup>2</sup>

<sup>2</sup> Plaintiffs previously filed an action in state court alleging all but the federal RICO claims. On August 18, 1993, Plaintiffs voluntarily dismissed the state court action pursuant to Minnesota Rule of Civil Procedure 41.01. Plaintiffs then filed suit in federal court against

## DISCUSSION

### I. STANDARD FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56, a moving party is entitled to summary judgment if the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of establishing the non-existence of a genuine issue of material fact. Id. at 323; City of Mt. Pleasant, Iowa v. Assoc. Elec. Co-op., 838 F.2d 268, 273 (8th Cir. 1988). Once it meets that burden, the non-moving party may not then "rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If, based upon the evidence, a reasonable jury could not return a verdict for the non-moving party, summary judgment is appropriate. Id. at 248.

### II. FRAUD CLAIM

#### A. Discovery of Fraud

Under Minnesota law, a party must commence a cause of action for fraud within six years from the date of "discovery by the aggrieved party of the facts constituting the fraud." Minn. Stat. § 541.05 subd. 1(6). The date of discovery is subject to a standard of reasonableness. Bustad v. Bustad, 116 N.W.2d 552, 555 (Minn. 1962); Blegen v. Monarch Life Ins. Co., 365 N.W. 2d 356, 357 (Minn. Ct. App. 1985). Thus, "the facts

AOSHPI, but dropped the claims against MVBA Harvestore, a Minnesota-based independent dealer.



constituting the fraud are deemed to have been discovered when, with reasonable diligence they could and ought to have been discovered." Bustad, 365 N.W. 2d at 357 (citations omitted).

A party's failure actually to discover the fraud will not toll the statute of limitations if such failure of discovery is "inconsistent with reasonable diligence." Id. The plaintiff carries the burden of proving that he did not, and could not through the exercise of reasonable diligence, discover the fraud within six years before commencement of the action. Blegen, 365 N.W.2d at 357.

The Court recognizes that "normally in a statute of limitations context fraudulent concealment and a plaintiff's due diligence are questions of fact unsuited for summary judgment." Hines v. A.O. Smith Harvestore Prods., Inc., 880 F.2d 995, 999 (8th Cir. 1989). Where "the evidence leaves no room for a reasonable difference of opinion," however, the district court properly may resolve fact issues as a matter of law. Miles v. A.O. Smith Harvestore Prods., Inc., 992 F.2d 813, 817 (8th Cir. 1993).

The Klehrs commenced this action on August 27, 1993. If, therefore, the statute of limitations for fraud began to run prior to August 27, 1987, Counts I and II will be time-barred. Defendants contend that the Klehrs knew or should have known shortly after they began using the Harvestore that the silo did not perform as represented and that they were not receiving the promised benefits.

The Klehrs maintain that they did not discover the facts constituting the fraud until April 1991, when Dr. Olson visited the farm and Klehr for the first time saw the moldy feed inside the silo. They assert that they exercised reasonable diligence in attempting to determine the cause of the problems they experienced with their herd over the years.

The evidence shows that the Klehrs should have known shortly after using the Harvestore silo that they were not

receiving the represented benefits which induced them to purchase the silo. Mr. Klehr, an experienced farmer, knew that exposure to oxygen causes mold and spoilage harmful to animals. Despite Harvestore's representation that the breather bag would prevent oxygen from contacting the feed and thus eliminate spoilage, Klehr almost immediately observed chunks of mold in his feed. The mold persisted each year Klehr operated the Harvestore. Each year he dumped spoiled feed in the field. The year Klehr noticed a significant increase in mold, along with a darker color and more pungent smell, he recognized the potential harm to his herd and dumped twelve spreader loads of spoiled feed in his field. M.K. dep. at 311-12.

The entire time he observed chunks of mold in his feed, Klehr's herd experienced numerous health problems. Contrary to Defendant's representations that feed from the Harvestore would result in healthier cows, Klehr saw an increase in digestive problems, uterus infections, foot and leg problems and displaced abomasums. Klehr's cows had dull coats and eyes and were thin and unthrifty. Additionally, the conception rates during his use of the silo were very poor and he experienced increased miscarriages and long calving intervals.

Although certain health problems had occurred prior to 1975, Klehr concedes that many problems increased after the purchase of the silo and that others began for the first time after 1975. While the deterioration in herd health and decrease in reproduction rates did not "hit [Klehr] overnight," these problems, directly contrary to Harvestore's representations, should have been apparent to Klehr at the latest by the early 1980s.

Additionally, Klehr concedes that he never realized any protein savings by using the Harvestore. In stark contrast to the advertisements, Klehr had to supplement the feed with protein at all times. Despite added protein and other vitamins,



his cows remained unthrifty and "were still lacking something."

Klehr contends that he reasonably investigated with his veterinarians, feed salesmen and nutritionists each and every problem he experienced with his herd. He maintains that because his experts failed to attribute the problems to the silo, he should not be charged with knowledge that the Harvestore was the source.

Although Klehr's experts failed explicitly to link the Harvestore to the problems with his herd, nothing prevented Klehr from discovering the connection. Klehr knew that oxygen caused mold and that spoiled feed could harm cows. In light of the numerous health and reproduction problems he experienced over the years, Klehr should have included the silo among the potential sources of his problems. Despite contrary explanations, Klehr should have made the connection and taken further steps to investigate the silo as the potential cause. As stated in Veldhuizen v. A.O. Smith Corp., 839 F. Supp. 669, 676 (D. Minn. 1993), "[t]he limitations period does not wait to run until the plaintiffs were able to make a causal connection between the failure of the silo to perform as promised and a particular design defect." Rather, the Klehrs had an affirmative duty to investigate the silo as a cause; the failure to do so is inconsistent with their duty of reasonable diligence. See Blegen, 365 N.W.2d at 357. See also Johnston v. Agristor Credit Corp., Civ. No. 84-4421-S (D. Kan. 1987) ("It appears from the record that the Johnstons did everything but check their new equipment; such action is not enough to satisfy the requirement that the fraud not be discoverable until December 1982").

Although the Klehrs did not actually discover the causal connection between the silo and the problems with their herd until April 1991, they should have realized well before 1987 that the representations regarding the characteristics of the Harvestore silos were false.

Furthermore, Klehr should have known that he was not realizing the promised increase in milk production and profits which induced him to purchase the silo. He had at his fingertips his monthly DHIA reports indicating that his milk production "was not going anywhere over the years." M.K. dep. at 512. Similarly, by simply reviewing the DHIA records, Klehr could have learned that he was not receiving the increased profits from his dairy business. Klehr's failure to separate his profits from his various enterprises, rather than combining the proceeds from his entire farm operation "into one kitty," is inconsistent with reasonable diligence as a matter of law.

The Court holds that Plaintiffs should have discovered, through the exercise of reasonable diligence, any fraud committed by Defendants long before 1987.

#### B. Fraudulent Concealment

Plaintiffs also argue that the statute of limitations should be tolled because Defendants fraudulently concealed the cause of action. "Fraudulent concealment tolls the statute of limitations until the party discovers, or has a reasonable opportunity to discover, the concealed defect." Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 918 (Minn. 1990). The limitations period is tolled, however, "only if it is the very existence of the facts which establish the cause of action which are fraudulently concealed." Id. at 918-19. Further, "there must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action." Wild v. Rarig, 234 N.W.2d 775, 795 (Minn. 1975). Showing that a defendant fraudulently concealed an alleged defect is insufficient; a plaintiff must show that he actually was unaware of the existence of the defect before the statute of limitations will be tolled. Hydra-Mac, 450 N.W.2d at 919.

The Klehrs contend that Defendants knew the Harvestore silos were defective and deliberately concealed the defects from them. They assert that Defendants, through fraudulent advertising, misrepresented the characteristics of the Harvestore before and after the sale. These continuing misrepresentations, the Klehrs claim, concealed the defect and prevented discovery of the fraud; therefore, the statute of limitations should be tolled under the doctrine of fraudulent concealment.

The Court finds that the fraudulent concealment doctrine does not apply to toll the statute of limitations. Defendants here took no affirmative steps which prevented discovery of the very facts establishing the cause of action. "[P]roviding the [Klehre]s with the post-sale materials does not rise to the level of affirmative concealment necessary to toll the statute of limitations." Veldhuizen, 839 F. Supp. at 675.

Moreover, the post-sale advertisements could not have concealed from the Klehrs the facts constituting the alleged fraud, namely that the Harvestore did not perform as represented. The Klehrs had only to look at the feed coming from the silo and observe the health of their herd to know that they were not getting better quality feed, protein savings and healthier cows. Further, they had only to look at the monthly DHIA reports to recognize that the promised increase in milk production and profits had not materialized. As the court stated in Miles v. A.O. Smith Harvestore Products, Inc.,

In the present case, Harvestore took no steps to conceal the facts giving rise to appellant's cause of action. It would have been impossible for Harvestore to have done so--the evidence was in appellant's yard, in daily use for the feeding of her animals. Appellant by the exercise of reasonable diligence should have realized that Harvestore had misrepresented the qualities of the silos.

Miles, 992 F.2d at 816.

Additionally, any management suggestions by Harvestore representatives did not, as a matter of law, rise to the level of fraudulent concealment. The representatives neither criticized Klehr's management of the silo nor attributed the mold, health problems or low milk production to Klehr's mismanagement. M.K. dep. at 325-28, 332-35, 710-12. Defendants did not affirmatively act with a design to prevent, and did not prevent, Plaintiffs' discovery of the facts establishing their cause of action. Accordingly, the statute of limitations will not be tolled for fraudulent concealment.

### III. RICO CLAIMS

Plaintiffs also allege RICO violations under 18 U.S.C. §§ 1962(a)<sup>3</sup> and (c).<sup>4</sup> A four year statute of limitations applies to civil RICO claims. Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 156-57 (1987). Plaintiffs' RICO claims are thus barred if the statute of limitations began to run prior to August 27, 1989. A civil RICO claim accrues from the time that the plaintiff "discovers, or reasonably

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<sup>3</sup> Section 1962(a) provides in relevant part,

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in . . . interstate or foreign commerce.

<sup>4</sup> Section 1962(c) provides,

It shall be unlawful for any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ."



should have discovered, both the existence and source of his injury and that the injury is part of a pattern."<sup>5</sup> Granite Falls Bank v. Henrikson, 924 F.2d 150, 154 (8th Cir. 1991) (quoting Bivens Gardens Office Bldg., Inc. v. Barnett Bank, 906 F.2d 1546, 1554-55 (11th Cir. 1990), cert. denied 500 U.S. 910 (1991)). As with the statute of limitations for fraud, the date when the injury and the pattern should have been discovered is subject to a standard of reasonableness. Id.; Veldhuizen v. A.O. Smith Corp., Civ. No. 4-92-1131 (D. Minn. Dec. 30, 1993).

As evidence of a pattern of racketeering, Plaintiffs allege receiving from Defendants twenty pieces of fraudulent advertising through the mail prior to their purchase of the Harvestore, and thirty-eight pieces of fraudulent advertising subsequent to the purchase. Plaintiffs allege a pattern of fraudulent representations by Defendants continuing for a period of more than twenty years.

The Court finds that Plaintiffs should have discovered the existence and source of the alleged injury and that the injury was part of a pattern at the same time they should have discovered the fraud. The same facts which should have alerted them to the fraud also should have alerted them that the alleged misrepresentations and injuries were part of a pattern. See AgriStor Financial Corp. v. Van Sickle, 967 F.2d 233, 242 (6th Cir. 1992) ("as a matter of law [the plaintiff] should have determined that the representations were part of a pattern at the same time it should have discovered that the silos caused the alleged problems on the dairy farm").

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<sup>5</sup> Plaintiffs cite no authority for their contention that the discovery accrual rule applies to Section 1962(c) but not to 1962(a). Because under both sections the injury results from the defendant's pattern of racketeering activity, the discovery accrual rule will apply to both RICO claims.

Plaintiffs contend that even under the discovery accrual rule set forth in Bivens Gardens and Granite Falls, a new cause of action accrues each time a party suffers an injury caused by a violation of 18 U.S.C. § 1962. Because they suffered damages until 1991, Plaintiffs maintain, a new RICO claim accrued with their last injury, rendering their 1993 lawsuit timely.

The Court rejects Plaintiffs' "last injury" argument. Although separate limitations periods may accrue from new injuries, the separate accrual is limited to distinct and independent injuries. Glessner v. Kenny, 952 F.2d 702, 707 (3rd Cir. 1991); Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1103 (2nd Cir. 1988), cert. denied, 490 U.S. 1007 (1989). In Glessner, the plaintiffs brought their RICO actions in 1988 after the defendants had ceased production of an allegedly defective furnace in 1983, thus ending the pattern of racketeering. The plaintiffs argued that although they first suffered injury, in the form of excessive repairs, prior to the expiration of the four year statute of limitations, they suffered a new and independent injury in 1984 when they had to replace the furnace. This new injury, they claimed, reset the statute of limitations. Glessner, 952 F.2d at 706-07. The court found that the plaintiffs' replacement of the furnace did not constitute a new and distinct injury but rather a continuation of their initial injury. As the court stated, "the mere continuation of damages into a later period will not serve to extend the statute of limitations." Id. at 708.

Similarly, the injury allegedly suffered by the Klehrs through 1991 does not qualify as an independent and distinct injury, but rather a continuation of the damages they suffered since using the Harvestore silo in 1975. Their injury arises out of Defendants' initial alleged wrongdoing, namely the fraudulent misrepresentations.

Because the Klehrs should have discovered the existence and source of this injury and that it was part of a pattern at the



sane time as they should have discovered the fraud, long before August 1989, their RICO claims are time-barred.<sup>6</sup>

#### IV. STATUTORY CLAIMS

Counts VI through IX of Plaintiffs' Amended Complaint assert claims for violations of the Minnesota False Statement in Advertisement statute (Minn. Stat. § 325F.67), the Minnesota Consumer Fraud Act (Minn. Stat. § 325F.68-70), the Unlawful Trade Practices Act (Minn. Stat. § 325D.13), and the Uniform Deceptive Trade Practices Act (Minn. Stat. § 325D.44). Minnesota Statute section 541.05 subd. 1(2) imposes a six year statute of limitations for claims based on liability created by statute. This provision does not include a discovery allowance as does the statute of limitations applicable to fraud claims. Minn. Stat. §541.05 subd. 1(2); Veldhuizen, 839 F. Supp. at 677. Thus, the six year limitations period commenced on the date of sale, 1974, when each of the alleged statutory violations occurred. Id. Accordingly, Plaintiffs' statutory claims are time-barred.

#### V. NEGLIGENCE CLAIM

Plaintiffs allege in Count V a claim for negligent misrepresentation. Under Minnesota law, a six year limitations period applies to negligence claims. Minn. Stat. §541.05 subd. 1(5). The statute of limitations begins to run

<sup>6</sup> For the same reasons as set forth with respect to the common law fraud claims, the doctrine of fraudulent concealment does not apply to toll the statute of limitations under RICO. Even under the federal fraudulent concealment doctrine, the limitations period will not be tolled unless the fraudulent concealment "misleads a plaintiff into thinking that he does not have a cause of action." Davis v. Grusemeyer, 996 F.2d 617, 624 (3rd Cir. 1993). As discussed supra, Defendants did not conceal the facts constituting the cause of action.

on negligence claims "when the negligent act or omission causes injury on which the injured party could maintain an action." Wittmer v. Ruegemer, 419 N.W.2d 493, 496 (Minn. 1988). Because Plaintiffs, alleged injuries began immediately after using the silo in 1975, the six year statute of limitations bars their negligence claim.

Even if not barred by the statute of limitations, Plaintiffs may not recover for negligence under the economic loss doctrine. See Superwood Corp. v. Siempelkamp Corp., 311 N.W.2d 159, 162 (Minn. 1981) ("economic losses that arise out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort theories of negligence or strict products liability"). As a matter of law, the damages claimed by the Klehrs are non-recoverable economic loss. Veldhuizen, 839 F. Supp. at 677. Under either theory, therefore, Plaintiffs' claim for negligence alleged in Count V will be dismissed.

#### CONCLUSION

Based on the foregoing and all the files, records and proceedings herein, the defendants' Motion for Summary Judgment (Doc. No. 120) is **GRANTED** and Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE**.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: January 6, 1995.

s/s  
MICHAEL J. DAVIS, Judge  
United States District Court

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

95-1355/mam

No. 95-1355MNST

Marvin Klehr, Mary Klehr,

Appellants,

William G. Olson,

Intervenor,

v.

A.O. Smith Corporation; A.O. Smith  
Harverstore Products, Inc.,  
Jointly and Severally,

Appellees.

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• Appeal from the  
• United States  
• District Court for the  
• District of Minnesota  
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Mr. Charles A. Bird  
BIRD & JACOBSEN  
305 Ironwood Square  
300 Third Avenue, S.E.  
Rochester, MN 55904

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The petition for rehearing filed by the appellants' has been considered by the court and is denied.

July 29, 1996

Order Entered at the Direction of the Court:

s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

United States District Court  
of Minnesota  
August 12, 1996

RECORD OF DOCKET TEXT

3:94-cv-00424 Klehr v. A O Smith Corp

DOCKET ENTRY

CERTIFIED COPY OF OPINION & JUDGMENT FROM  
USCA ( Fagg) ( Heaney) ( Hansen) - J; filed 6/6/96 that the  
judgment of the District Court in this cause is affirmed in  
accordance with the opinion of the Eighth Circuit. [223-1]  
(17pgs) (cc: All Counsel) Mandate issued 8/9/96

Hon. Michael J Davis, Judge

THIS NOTICE SENT TO ALL COUNSEL

D-1

LAW DEPARTMENT

*Subject:* Continuing Harvestore Difficulties

*Date:* January 3, 1968

*Attention:*

Messrs. L. B. Smith	<i>From:</i> James N. Johnson
U. T. Kuechle	<i>Dept.</i> 0116
A. D. Hyde	<i>Location:</i> Milwaukee
M. E. Morgan	
R. F. McGinn	
R. C. Smith	
Howard Johnson	
Cloy Knodt	

During the development by the plaintiffs of the evidentiary facets of their cases in the California courts, the most prolific source for such development, to which they turned again and again, was the voluminous reports and memoranda issued by one department or division head to another, or by division or department heads to outsiders, such as dealers. In many respects, these memos formed every bit as much damning evidence as did any of the advertisements or promotional pieces upon which the plaintiffs sought to rely.

Admittedly, a large corporation such as ours moves forward, even though slowly, it appears sometimes, on exchange of pieces of paper. No one knows more poignantly, than do lawyers, how necessary writings sometimes may be in order that points of view can be clearly expressed and accurately memorialized. We will be the first to insist that writings, in many cases, are absolutely necessary.

E-1



However, in times such as those through which Harvestore is passing, and when it appears that its mechanical problems are yet far from solution, I suggest that the writings with respect to such problems be kept to an absolute minimum and, to the degree that they appear to be necessary, they should be addressed to the law Department, with copies to those to whom they might otherwise be addressed, so that each memo will receive, as it properly should, the mantle of privileged communication and, thus, be secure from seizure by subpoena in discovery proceedings if additional litigation should ensue.

Product failures and the claims made against the Company in connection therewith, along with any responsibility of the Company's undertaking to correct such failures, all are matters of appropriate reference to the Law Department for analysis and suggestion. They are a joint problem between administrative engineering, sales, and law, but, ultimately, reflect the possible legal claims and attending litigation. Therefore, their joint assessment and correction under the supervision of the Law Department is not only proper as a matter of form, but also as a matter of substance, and any writings in connection therewith, so long as they are addressed to the Law Department with copies to the responsible administrative engineering or sales executive involved, will be secure from seizure.

Therefore, I earnestly solicit your cooperation to frame your memos in the manner I have suggested above, so that notwithstanding they are addressed to the Law Department, the copies to the interested executives will permit the work to move forward without fear of having the substance of the memos being used against us in litigation.

s/s

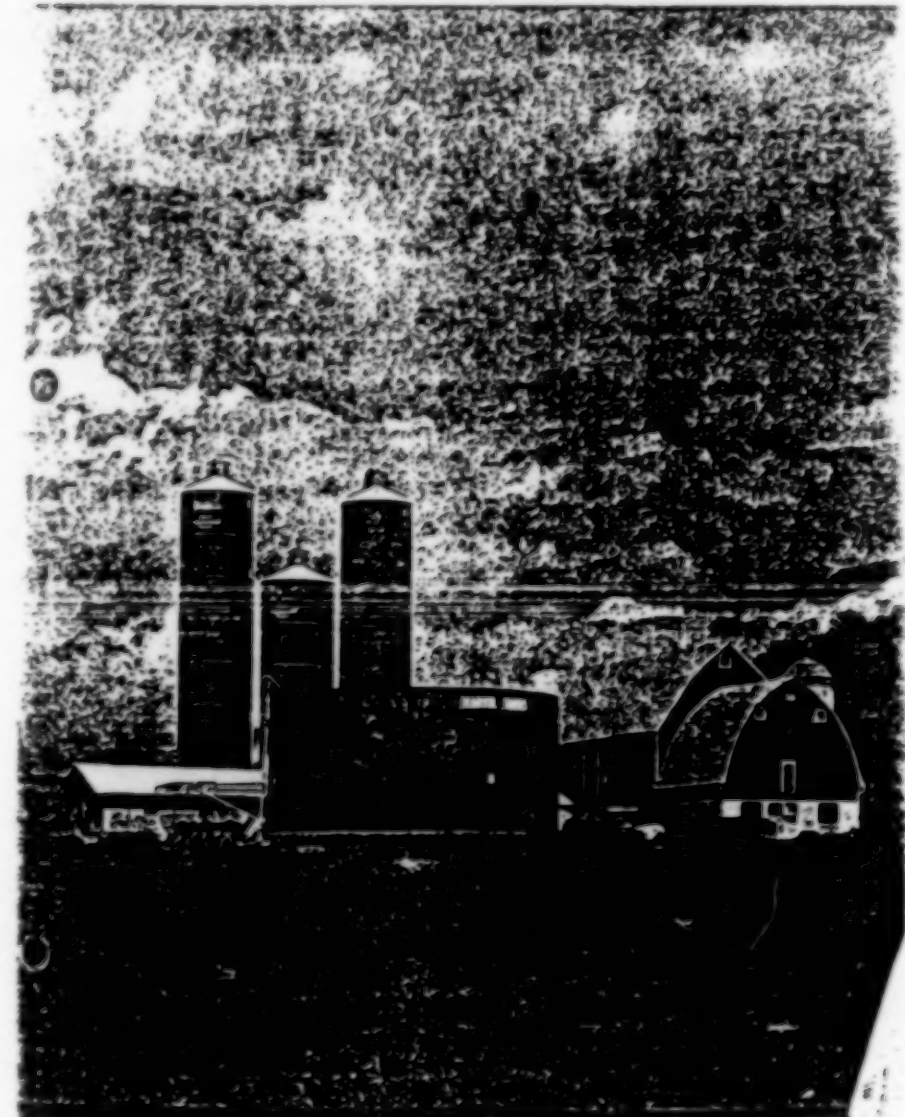
James N. Johnson

JNJ:bjh

E-2

## HARVESTORE FARMING

Fall, 1989



F-1



A. O. Smith Harvestore® Products, Inc. is ready for the future, stronger than ever, thanks to a commitment made 40 years ago: never compromise quality. We're proud to be an authorized, independent Harvestore Systems dealer. We thank you, our friends in the farming community, for so many good years.

## BUILT ON A STRONG FOUNDATION.

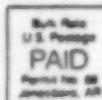


A. O. Smith Harvestore Products, Inc.  
345 Harvestore Drive  
Dekalb, IL 60115

### Your Harvestore system dealer...

... has brought you this complimentary copy of Harvestore System Farming, with the hope that the information it contains will help you make your farming more profitable. Your dealer will be happy to answer questions on how Harvestore system farming can benefit your operation. He's ready to serve you in every way possible, with management and planning advice, sales, and service.

ADDRESS CORRECTION REQUESTED



### Nutritious, Cost-Efficient Feed

Inside the glass-fronted-to-steel panels of a Harvestore structure is quality, nutritious feed. These similar blue panels stand up to strong acid and moist weathering. A breather bag system reduces storage by making oxygen contact. Feed can be moved at optimum moisture levels for

maximum palatability. Because it is shed from the top, and undisturbed from the bottom, you have the flexibility to store many feeds under a wide variety of conditions. When it's droughty, you can get more out of the feed and extend over all feed life. Since 1948, it remains the most advanced concept for storing and handling large and grain.

### New Products For The '90s

Inside a Harvestore structure are two highly clean-type large containers. Outside, a wide range of multiple feed delivery options can handle the production demands of the '90s. Recent introductions for our 40th Anniversary year include the Model 220 Heavy Duty Bulk Conveyor, high-capacity Shurpump® structure, and a built-in mixer electronic digital scale. Harvestore Systems products are being used with increased frequency in industrial markets, creating a diversified and balanced company-wide strength—giving us the freedom to develop new products for agriculture.

### Best Engineered Replacement Parts

Inside every piece of Harvestore equipment are precisely engineered parts. Only one part can bring it to original specs, and that's a Harvestore® part, replacement and manufactured by us for Harvestore Systems. They're only available from your authorized, independent Harvestore Systems dealer. Only a Harvestore part meets our rigid specifications, only a Harvestore manufactured part is the real match.

### Retooled Manufacturing Efficiency

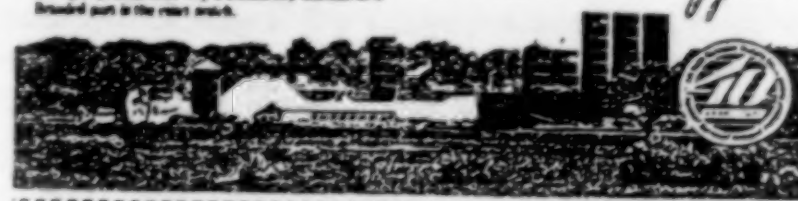
Inside the DeKalb, Illinois manufacturing facility are several plants in one. There's a complete state-of-the-art machining center, complete metal fabrication capabilities, a painting system that incorporates all the latest glass-coating technology, all manufacturing and administrative operations, all parts. Our new service-oriented computer system recently came on line. So far, we've spent over \$5.5 million in retooling costs to achieve maximum efficiency. Over \$2.5 million is earmarked for future improvement. If you have a choice, come visit the DeKalb plant to celebrate our 40th Anniversary. You'll find talented, quality-oriented people who do the best job possible.

### Dependable, Knowledgeable Dealer Network

Inside your local, authorized, independent Harvestore Systems dealer is a person who wants you to succeed. Don't be happy to demonstrate how you can use Harvestore Systems products to benefit your operation, as they have benefited others for 40 years. Your dealer is ready to help you in every way possible with information and service. However, only those Harvestore and Shurpump structures built to exact specifications by an authorized dealer are covered by Harvestore Systems' limited warranty. And only your authorized dealer has access to Harvestore's innovative financing programs. For performance, efficiency, and dependability, give him a call.

A. O. Smith Harvestore Products, Inc.  
DeKalb, IL 60115  
402-758-1551

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Steve Haggard  
Executive Director, Animal Industry Foundation  
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Harvestore Systems Farming magazine  
345 Harvestore Drive  
DeKalb, IL 60115

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Marvin Klehr and  
Mary Klehr,

Case No.: 4-93-822 (JMR)

Plaintiffs,

AMENDED COMPLAINT

Jury trial demanded

v.

A.O. Smith Corporation and  
A.O. Smith Harvestore Products,  
Inc., Jointly and Severally,

Defendants.

Plaintiffs, Marvin and Mary Klehr, by and through their attorneys, as noted below, state the following as their claims in this matter:

[Paragraphs 1-9 deleted]

10. From 1969 up to the date of sale on or about July 15, 1974, AOS, AOSHPI and/or MVBA, both directly and indirectly furnished the Plaintiffs with various sales literature, including, but not limited to:

(a) Printed materials from AOSHPI and AOS regarding the Harvestore structure, which included the following:

(1) On or about January 25, 1974, Plaintiffs received, in the U.S. Mail, the "Hoards Dairyman" magazine which, at page 105, was an advertisement entitled, "Twenty-five Years Ago it All Started With Just One" made and published by Defendants. This advertisement falsely represents that AOSHPI was a twenty-five-year-old company. This ad led Plaintiffs to believe that they were dealing with a single company they knew as "A.O. Smith" that had been around for many years. This advertisement, among other things, caused Plaintiffs to purchase the silo because they believed they were dealing with a very reliable company that had been in business for many years. In reliance upon this representation, Plaintiffs purchased the silo and suffered damages.

(2) In December, 1972, through the U.S. Mail, Plaintiffs received the Harvestore, Farmer, 1973 Buyer's Guide issue, made and published by Defendants (Vol. 11, No. 6), which includes a postage-paid return card for additional Harvestore product information, and states, at Page 6, that Harvestores prevent oxygen from contacting the feed. Plaintiffs believe they may have also received this item at the State Fair in August, 1973, and/or personally from Mr. Deutsch in the summer of 1973. It also has a diagram of the top of a Harvestore structure which shows air going in and out of the breather bags but not in and out of the pressure relief valve or unloader door, thereby falsely implying that no ambient air can reach the stored feed through normal daily use. At page 10 of the Buyer's Guide is a description of the Harvestore dealer. It states the dealer is a professional in farm management and also says that if the dealer "doesn't have the answers himself, he can call on the experts at A.O. Smith Harvestore to help get the answers." Plaintiffs believed and relied upon the design of the silo as described. Plaintiffs believe that, through the dealer, they had access to all the research and knowledge of the experts at A.O. Smith Harvestore. Such Buyer's Guide



issue, and the representations contained therein that were made by A.O. Smith and AOSHPI, were relied upon by the Plaintiffs in purchasing the silo and as a result suffered damages.

(3) In January, 1974, through the U.S. Mail, and also personally from Richard Deutsch, a salesman of MVBA, Plaintiffs received the 1974 Harvestore Farmer Buyer's Guide, (Volume 13, No. 1.), which was made and published by A.O. Smith and AOSHPI in written form. Such Buyer's Guide issue contains false representations, on Pages 4-5, that Harvestore silos prevent oxygen from coming into contact with the feed, and contains false depictions of Harvestore silos, which have no reference to the pressure relief valve and/or air coming in through the unloader door. On page 2223 of the Buyer's Guide it states that the network of dealers supports Harvestore owners. It states the dealers are experts in techniques of planting, cropping, harvesting, animal nutrition, farm counseling, installing and service. It says salesman and service workers are trained at "Harvestore's headquarters in Arlington Heights, Illinois." This ad caused Plaintiffs to be very confident in the design and follow-up service available. Plaintiffs believed the dealers, who were trained by A.O. Smith, knew everything A.O. Smith knew about the product and could answer all questions about the silo. This advertisement was relied upon by the Plaintiffs in purchasing the silo and caused them to suffer damages as a result of the use of the silo upon their farm.

(4) Sometime in the early 1970's, before the purchase of the silo, Plaintiffs received, in the U.S. Mail, a brochure entitled "Smile When You Call it a Silo", made and published by A.O. Smith and AOSHPI. Such brochure is in written form and falsely states, at Page 2, that Harvestore silos virtually eliminate storage losses. Said brochure also contains a

coupon, which solicits mail inquiries regarding the Harvestore System. Plaintiffs relied on this ad in purchasing the silo, and suffered damages as a result of using the silo on their farm.

(5) Sometime in the early 1970's, before the purchase of the silo, Plaintiffs received, in the U.S. Mail, from AOSHPI, a brochure entitled, "Revolution in Blue", made and published by A.O. Smith and AOSHPI. Such brochure falsely states, at Page 2, that oxygen-free storage can be maintained in a Harvestore silo and refers to A.O. Smith as backing the product. At Page 4, there is reference to marine hatches, sealing of joints, and a breather system that prevents oxygen from contacting the feed and spoiling it. At Page 5 are photographs of the breather bag system which, it is falsely claimed, prevents oxygen from contacting the feed, but no reference to a relief valve or unloader door. At page 8 is a description of the services available from the dealer. It states that A.O. Smith has participated in dozens of research projects "and the results are available to you from your Harvestore representative". It says "Harvestore researchers" have data from all over the country that is available from the Harvestore representative. Plaintiffs believed that all research done by Defendants was available to the dealers, including MVBA, and was in support of Defendants design claim (air doesn't touch the feed). Plaintiffs relied on these representations in purchasing the silo, and suffered damages as a result of using the silo their farm. Plaintiffs now know this is false because the damaging research was kept secret and confidential by Defendants and never disclosed to the dealer organization, including MVBA.

(6) When Plaintiff's took over the farm, on January 1, 1969, there existed on the farm a "Here's How" operator's manual for their smaller Harvestore silo, which was made and published by A.O. Smith and AOSHPI, and contained

numerous false representations relating to oxygen-free storage, to the air-tight silo solving the problem of air coming in during feeding, and falsely comparing a Harvestore to a fruit jar, and also containing a warranty card for use through the mails. (See Pages 2-3, 2-4, 3-9, 4-8, 5-6, 6-6.) At page 22 it states the Harvestore dealer has all the answers because the dealer is backed by one of the most experienced and talented staff in the agricultural industry. It states that AOSHPI has experts in research and engineering, whose findings are passed along to the dealer, who can make them available to the farmer. These representations are false because Harvestore silos are neither oxygen free nor oxygen limiting. In addition, Defendants did not "pass along" to the dealers the internal research showing the design flaws (see paragraph 26). Plaintiffs reviewed this operator's manual over the years preceding the 1974 purchase and relied upon the representations referred to in purchasing the 25 x 80 Harvestore silo in 1974, which caused Plaintiffs damage as a result of using the 25 x 80 silo on their farm.

(7) In the year preceding the sale of the Harvestore silo, (before 7-15-74) Plaintiffs reviewed an ad supplied to them by MVBA and its salesman, Richard Deutsch, at their home and at a Minnesota State Fair before the purchase of the silo, entitled, "How Does A.O. Smith Harvestore Prevent Spoilage?", said ad being published and made by A.O. Smith and AOSHPI. Said ad falsely states that Harvestore silos keep out air and have depictions of the Harvestore silo, showing air going into the bag, but not into the feed. Plaintiffs relied on this information, concerning the design of the Harvestore silo, purchased the silo in reliance upon such advertisement, and suffered damage as a result of using the silo on their farm.

(8) Plaintiffs received in the U.S. Mail in May, 1972, the Harvestore Farmer (Vol. 11, No. 3), which contained an

article entitled, "The Art of Haylage Making", at Page 11 thereof. Plaintiffs also saw this article after the sale. Such article was made and/or published by A. O. Smith and AOSHPI and falsely states that the breather system protects feed from oxygen and spoilage, indicates that only in conventional storage methods is there a continuous supply of fresh oxygen, thus continued destruction of the feed, and that the only bacteria that grow in Harvestore's oxygen-limited environment are anaerobic bacteria. This advertisement also stressed management skills and the making of haylage, and that immediately after filling, the Harvestore contains an inert, odorless gas-carbon dioxide. Plaintiffs relied upon this brochure in purchasing the silo, and thereby suffered damage. It reassured the Plaintiffs, when it was seen later, that they had purchased the best silo, and that they were doing everything right, and if anything did go wrong, it was due to their management of the alfalfa or management of the silo, and not due to any design problem, thus causing them to continue to use the silo and suffered damages from the use of the silo.

(9) At the Minnesota State Fair, in the early 1970's, Plaintiffs were shown an ad, "Do You Have a Nose For Good Feed?", that was made and published by A.O. Smith and AOSHPI. This advertisement stated that good feed was like molasses. Plaintiffs believed that their cows would like molasses-like feed. Plaintiffs bought the silo, in part, based upon this advertisement, and thereby suffered damages as a result of using the silo. Plaintiffs also had dark, molasses-like feed during the time the silo was in operation, and believed that this was normal for Harvestore feed, but later learned that dark, molasses-like feed was evidence of heat damage. This ad, therefore, also caused Plaintiffs to misjudge the quality of the feed from the Harvestore silo, and they continued to use the silo and suffered continued damages.



(10) Plaintiffs received the May 25, 1974 issue of "Hoard's Dairyman" through the U.S. Mail which, at Page 679 contained an advertisement entitled, "These Harvestore Owners Started With Just One". Plaintiffs relied upon this ad in purchasing the silo, and suffered damages as a result of using the silo. Said advertisement has a mail-in coupon for a brochure entitled, "You Can't Beat the System", which brochure falsely states that A.O. Smith Corporation, a multi-million dollar steel fabricating corporation, tackled the problem of oxidation in feed and won (Page 6). Said brochure also states that Harvestores have a set of lungs so it can breathe, relieving pressure without allowing oxygen to spoil the feed, stating that air never touches the feed because it's trapped in the breather bags (Page 7). Plaintiffs also saw the advertisement, "These Harvestore Owners Started With Just One", in November of 1974, in another farm magazine, which Plaintiffs cannot presently recall.

(b) Films produced by AOSHPI and AOS touting the quality and character of the Harvestore structure, believed to be the Magic of the Harvestore Storage, and the Harvestore System, or films substantially similar thereto. These films were seen in Plaintiffs kitchen on several occasions in the year leading up to the sale (7-15-74). Richard Deutsch, salesman for MVBA, showed these to Plaintiffs. The films contain the following material misrepresentations:

#### (1) HARVESTORE SYSTEM

States that Harvestore solved the breathing problem in silos by using a breather bag system for air that's contained in the bags and doesn't contact the feed. It states A.O. Smith engineers solved the problem of structure breathing by using a balloon-like bag that keeps the air from contacting the stored feed. There is a depiction of the Harvestore silo with no

breather valve. It states the Harvestore silo takes the time element out of storage. It states the time element is removed from feed management. It states there is a difference between a Harvestore silo and a conventional silo, which is the difference between a Model-T and a jet plane. It states that concern over spoilage is eliminated. It states that Harvestore silo owners have the assurance of dependability of A.O. Smith Corporation in Milwaukee, Wisconsin. It states that Harvestore markets through a world wide dealer organization. It states the dealer stands behind the farmer for as long as he owns the equipment. It states the salesman is trained in crop management, animal nutrition, farmstead planning, finance and other key areas and will put that knowledge to work for the farmer. It states that the Harvestore silo is backed by a century-old company, the A.O. Smith Corporation. Plaintiffs believed and relied upon such statements and purchased the silo in reliance thereon and suffered damages as a result of using the silo on their farm. Plaintiffs also saw this film, or a film substantially similar thereto, after the sale of the silo on several occasions at MVBA meetings. The film caused the Plaintiffs to continue to believe in the design of the Harvestore silo and to continue to use it to their detriment.

#### (2) MAGIC OF HARVESTORE STORAGE

States that the system lets air move in-and-out, yet not contact stored feed. States that the Harvestore answer to the problem of air contacting feed is the now famous breather bag system. It states the bags keep the air from touching the feed. A depiction of the Harvestore silo is given with no explanation of the breather valve. It states "The bags keep the air from touching the feed." It states the Harvestore "breather system permits air to pass in and out of the structure without contacting the feed." It states that primarily what Harvestores do is make money. It states that the Harvestore breather



system permits air to come in-and-out of the structure without contacting feed. Plaintiffs believed and relied upon such statements and purchased the silo in reliance thereon and suffered damages as a result. Plaintiffs also saw this film, or a film substantially similar thereto, after the sale of the silo on several occasions at MVBA meetings. The film caused the Plaintiffs to continue to believe in the design of the Harvestore silo and to continue to use it to their detriment.

(c) The "Harvestore Farmer Magazine," which came by U.S. mail, on the dates indicated below, from Defendants to Plaintiffs residence included the following material misrepresentations upon which Plaintiffs relied to their detriment:

(1) Volume 11, number 2, (March-April 1972) at page 12. There is an article entitled "Harvestore The Inside Story". At page 13 there is depiction of the Harvestore silo and a discussion of the breather bag system in which it is stated that the air remains trapped in the breather bags where it cannot come into contact with the feed and that the system can compensate for pressure changes within the structure without allowing oxygen to enter the stored feed. The back page of this magazine states that "A.O. Smith" the name above the Harvestore is a leader in five major industries and that for 25 years Harvestore has been a leading manufacturer of automated feeding systems. Plaintiffs believed in the design of the silo to "prevent oxygen from contacting the feed." The longevity reliability, and backing of A.O. Smith was a material fact in deciding to purchase the silo and continuing to operate the silo over the years.

(2) Volume 11, number 3 at page 11, (May, 1972) is an article entitled "The Art of Haylage Making" which falsely states that the breather system protects feed from oxygen and

spoilage, and indicates that in conventional silos there is a continuous supply of fresh oxygen, thus continued destruction of the feed and that the only bacteria that grow in Harvestore's oxygen limited environment are anaerobic bacteria. This advertisement also stresses management skills and the making of haylage and that immediately after filling the Harvestore contains an inert, odorless gas-carbon dioxide. The design was important, as noted above. "Keeping the air out" is very important. However, if anything did go wrong, Plaintiffs looked to their own management skills or a repairable defect in the silo as a source of the problem and did not question the design of the silo.

(3) Volume 11, number 6, (November-December, 1972). Harvestore Farmer 1973 Buyers Guide states at page 6 that Harvestore silos prevent oxygen from contacting the feed. It has a depiction of the Harvestore silo, showing the sun and the moon, and air going in and out of the breather bags but not depicting the breather valve. It states that the fresh air is kept inside the heavy vinyl bags, and it does not reach the stored feed. Plaintiffs relied on this for reasons stated above.

(4) Volume 12, number 6 (November-December 1973). On the back page is an advertisement which discusses the corporate backing of A.O. Smith and the false statement that for 25 years Harvestore has been a leading manufacturer of automated feeding systems. This caused the Plaintiffs to believe that the name above the Harvestore "A.O. Smith" is backing the product and had been involved in manufacturing Harvestore silos for 25 years. The reliability and longevity of the company was a material factor in Plaintiffs' decision to purchase the silo, and also continued belief in the design of the silo.

(5) Volume 13, number 1 (January-February 1974). On page 4 of the Buyer's Guide is an article entitled "How a Harvestore Works" which falsely states that Harvestore silos are oxygen limiting, causes confusion between A.O. Smith and A.O. Smith Harvestore Products, Inc. and states that the Harvestore system is designed to provide an oxygen limited environment which is intended to prevent spoilage of feed while in storage and that Harvestores prevent the entry of oxygen. It has a depiction of the sun and the moon and the breather bags without showing the pressure relief valve and it goes on to state that the breather bags contain the destructive oxygen, keeping it from contact with the feed. It states that when the temperature drops the breather bags inflate and contain air that would otherwise enter the Harvestore. On the back page of this issue of the Harvestore farmer is an advertisement entitled "The Sun never sets on the Harvestore System." This ad states, falsely, that A.O. Smith Harvestore Products, Inc. is celebrating its 25th anniversary in 1974 when, in fact, it was incorporated in 1961. This advertisement intentionally confuses the relationship between A.O. Smith and A.O. Smith Harvestore Products, Inc. Plaintiffs relied on this for reasons set out above.

The Harvestore Farmer Magazine (later named Harvestore System Farming) was published by AOSHPI, and produced by Dave Brown and Associates, Chicago, Illinois. Before publication, each issue was submitted to AOS for approval. After approval by AOS, each issue was transferred to Missouri where it was printed and mailed to farmers and dealers.

(d) The "Hoard's Dairyman" magazine was received by Plaintiffs, through the interstate U.S. Mail, from January 1969 to the present. Defendants used the U.S. Mails to deliver advertising copy to Hoard's Dairyman magazine with the expectation and knowledge that the magazine would be mailed

to Plaintiffs and other farmers similarly situated. All advertisements in this magazine were submitted to AOS for approval before being published. This magazine, received by the Plaintiffs in the U.S. Mail on the dates indicated below, included the following material misrepresentations upon which Plaintiffs relied to their detriment (in addition to the Hoard's Dairyman ads set out in Paragraph 10(a):

(1) Page 67 of the January 10, 1972 issue has an advertisement entitled "The Name Above Harvestore Is a Worldwide Leader in Five Major Industries". This advertisement falsely states that A.O. Smith Corporation stands behind every Harvestore system silo and gives the impression that AOS is the manufacturer of the equipment. Plaintiffs relied on this for reasons set out above.

(2) Page 71 of the January 10, 1973 issue had an advertisement entitled "This Is Not a Silo". This advertisement falsely states that the internal breather system compensates for internal pressure changes. It also implies that AOSHPI has been in business for over 25 years. This ad contains a coupon encouraging the farmer to mail it in to receive additional information by return mail from AOSHPI. Plaintiffs relied on the design of the breather system in purchasing the silo.

(3) Page 152 of the March 25, 1973 issues has an advertisement entitled "Push Button Feed Processing System". This ad falsely states that the breather bag system keeps pressure equalized within a structure, therefore, never touching the feed. It also contains a coupon encouraging the farmer to mail it in to receive additional information by return mail from AOSHPI.



11. During the period, July 1973 to July 15, 1974, Richard Deutsch, the salesman of MVBA, made visits and telephone calls to Plaintiffs farm on 6 to 8 occasions. He made numerous representations, orally and by providing printed materials and films produced by AOS and AOSHPI about the Harvestore structure (the latter being outlined in paragraph 10) including the following:

(a) That Harvestore structures were "oxygen limiting" and would prevent oxygen from coming into contact with the feed, would preserve feed like a fruit jar and would properly store and preserve the feed.

(b) That the breather bag in the Harvestore structure compensated for all temperature and pressure changes and, even during unloading of the silo, any air that would enter the silo would be negligible because the Harvestore structure was equipped with an unloader designed to exclude air.

(c) That the air coming in the unloader door during unloading of the Harvestore structure was a very small amount and, because it would be quickly converted to a harmless gas, it would not harm the feed.

(d) That any air coming into a Harvestore structure could only enter because of a repairable problem in the Harvestore structure or due to improper management of the silo by the farmer.

(e) That A.O. Smith and A.O. Smith Harvestore Products, Inc. were really a single company and that Plaintiffs, as part of the purchase of the Harvestore structure had the backing and dependability of a century old corporation.

(f) That because of the unique features of the Harvestore structure, it was worth the additional money Plaintiffs were paying for the silo because it would produce better feed.

(g) That good Harvestore feed was a dark molasses color and would be warm and would be more palatable for the cows.

(h) That A.O. Smith had created a dealer organization that was the partner of the farmer, who was trained by the Defendants, had complete knowledge of the product, and had access to all of the research and scientific studies known to Defendants in-house experts in the fields of engineering and animal nutrition. Plaintiffs were directed to go to the dealer (MVBA) and the salesman (Richard Deutsch); the latter being described as the "Agri-Answer Man" for any questions on the product.

[Paragraphs 12-14 deleted]

15. Both before and after the installation of the Harvestore structure and throughout the period the Harvestore structure has been present on Plaintiffs property, the Plaintiff's received through the U.S. Mail "Harvestore Farmer" magazine until July, 1980, and "Harvestore System Farming" magazine from December 1980 to Spring 1991 and Hoard's Dairyman Magazine from January 1969 to the spring of 1991 and other farm related magazines outlining the benefits of the Harvestore structure as originally represented to the Plaintiffs, including the false statement that it would prevent oxygen from contacting the feed. In particular, said ads misrepresented the facts as outlined below upon which Plaintiffs relied to their detriment in that they continued to use the silo in reliance upon the design as stated in the ads and did not question the Harvestore silo as a source of problems on



their farm at any time before March, 1991. Rather, Plaintiffs looked to their farm management or repairable defects in the silo. Also, Plaintiffs continued to believe in the dealer (MVBA) having complete knowledge of the silo design and having the ability to answer any questions about the operation and use of the silo. This was especially important to the Plaintiffs because the "Dealer Organization," including MVBA, created by the Defendants was backed by a century old company that was a world leader in many manufacturing areas, whose engineers had carefully researched and created specifications for the Harvestore silo. Plaintiffs now know the dealers were not informed of any of the secret and confidential research outlined at paragraph 26; and now realize that "A.O. Smith" is not backing the product, and that AOS now claims that it didn't have anything to do with the product at the time it was manufactured and sold to the Plaintiffs. The magazines were mailed by Defendants and/or MVBA (Harvestore Farmer and Harvestore System Farming) and by Hoards Dairyman, and received by Plaintiffs on the dates indicated below.

#### HARVESTORE FARMER AND HARVESTORE SYSTEM FARMING

(a) Volume 14, number 2 (1975 Buyer's Guide Special, March, 1975) at page 6 falsely states that a Harvestore is oxygen limiting, using a breather bag system to keep air from reaching the feed to prevent spoilage and loss of nutritional value. It also states that a Harvestore is no cure all for problems that arise from poor management--in fact, a Harvestore might only intensify the trouble where poor management is at fault. It goes on to state that in oxygen limited environment the process of fermentation is carried out by anaerobic bacteria that survive without oxygen. This same issue refers to the Harvestore representative as the "Agri-answer Man". It states that he has all the answers and that

"backing him up is the world's largest manufacturer of feed processing and automation equipment with more than a quarter of a century of helping farmers..." It tells the reader to circle number 3 on the handy postage paid return card in that issue.

(b) Volume 15, number 3 (Buyer's Guide Issue--June 1976). At page 6 of the Buyer's Guide are misrepresentations concerning the oxygen limiting features of the Harvestore system. There is a depiction of the top of a Harvestore silo showing the breather bags and the sun and the moon, but no depiction of the pressure relief valve. This depiction is a false analogy between conventional silo systems and Harvestore silos. It claims that in conventional silos air enters the feed with every daily cycle, but that the flexible bags in a Harvestore expand and contract to balance inside pressure without allowing air to contact the feed.

(c) Volume 15, number 5 (November, 1976) at page 6 is an article entitled "Bottom Unloading: Where Efficiency Begins". This article falsely states that bottom unloading helps prevent oxygen from coming into contact with the stored feed. It states that livestock receives warm feed in the coldest of weather, without stating the true reason why the feed is warm, (which, in fact, is caused by the continued respiration of the feed caused by design flaws) and falsely touting this as an advantage. At page 7 there are references to A.O. Smith engineers and A.O. Smith Harvestore Products, Inc. engineers, which lead the farmer to believe that there is a single company. It also states that one of the basic challenges confronting A.O. Smith engineers when they first began designing the Harvestore system, was to develop a method of unloading that did not allow the structure to fill with oxygen. It goes on to falsely state that bottom unloading was the best possible

solution to the problem. In fact, bottom unloading is the problem because of air entrance during unloading.

(d) Volume 18, number 1 (February 1979) page 20. It states that "we" made equipment 30 years ago, and "we" made it better every year since, which intentionally confuses the distinction between AOSHPI and AOS since AOSHPI was not in existence until 1961. There is a depiction of the top of a Harvestore with the breather bags showing air going in and out of the breather bags but no depiction of the breather valve. The advertisement falsely states that in a Harvestore structure air doesn't touch the feed and that the fermentation process stops in an oxygen limiting silo after oxygen is used up after filling. This advertisement also establishes a toll free number for recipients to obtain information and solicits the use of the mails.

(e) Volume 18, number 3 (June, 1979) at pages 4 and 5 is an article regarding the development of the Harvestore by "A.O. Smith" engineering. This article discusses excessive spoilage in conventional silos due to continued access of oxygen and compares it to the solutions designed by the "A.O. Smith" engineers. It states that the Harvestore structure contains virtually no air but the engineers had to solve a problem regarding external air pressure and internal air pressure. The "solution" to the problem was a plastic bag mounted in the structure that "equalized the pressure inside and outside the units walls while preventing air from contacting the feed and causing spoilage." In the same issue at page 9 is an advertisement depicting the sun and the moon showing the breather bag system but not depicting the pressure relief valve. It also states that the air in the breather bags doesn't touch the feed, but does not state that air comes in through the unloader door and through the pressure relief valve. This ad also has a coupon for the farmer to mail in for

additional information and also has a toll free number to obtain further information about Harvestore silos. It also states that "we made good equipment 30 years ago. We made it better every year since." The back cover discusses celebration of 30 years and states that "we didn't let success go to our head." It also states "we've continually worked at improving it", and "we've developed a dealer organization dedicated to providing the best in sales, construction, and service too." Since AOSHPI was not in existence until 1961, the ad intentionally confuses the distinction between AOS and AOSHPI.

(f) Volume 18, number 4 (October, 1979). The back cover has the same advertisement in the immediately preceding subparagraph.

(g) Volume 18, number 5 (December 1979) at page 25 is an advertisement which has a diagram of the top of a Harvestore silo showing the sun and the moon and the air going in and out of the breather bags but not depicting the pressure relief valve and stating that air doesn't touch the feed and that fermentation stops before excessive amounts of feed are lost. This ad doesn't mention air coming in through the pressure relief valve or through the unloader door. The ad has a mail in coupon and advises the reader of a toll free number to obtain further information about Harvestore storage systems. The back cover has the same advertisement regarding the 30 year as mentioned in the immediately preceding subparagraph.

(h) Volume 19, number 2 (May 1980) has an advertisement at page 16. This also has a depiction of the top of the Harvestore silo but does not show the pressure relief valve. The ad falsely states, "as outside temperatures fall the head space gases inside cool and contract, causing air to enter the bags but not allowing the feed deteriorating oxygen to



come into contact with the feed." It has a coupon mailed to AOSHPI to obtain a brochure entitled "High Moisture Grains" which brochure, on the back cover has a misrepresentation concerning the oxygen limiting nature of the Harvestore silo.

(i) Volume 20, number 5 (August 1981) states on page 13 that "when grain is stored at recommended moisture levels in a properly maintained Harvestore structure, the fermentation process will quickly eliminate oxygen and prevent mold formation", without stating that once air comes back into the silo through the unloader door and/or the pressure relief valve through normal daily use, secondary fermentation will begin and mold will be formed.

(j) Volume 20, number 4 (August, 1981). There is an article on page 24 wherein it states "fermentation of the stored forage or grain quickly uses up the air trapped inside during filling allowing anaerobic fermentation to replace the aerobic process that occurs when oxygen is present", without informing the farmer that known design flaws will cause aerobic degradation throughout the normal, expected use of the silo on the farm. At page 13, it falsely states that "A.O. Smith Harvestore wrote the book on oxygen limiting storage systems, more than 30 years ago."

(k) Volume 21, number 2 (April, 1982) at page 2 has an ad entitled "Here today, here tomorrow" that has a mail-in coupon for the "Harvestore System" brochure. See Paragraph 16(g). It states the Harvestore silo has the "backing of a company known for quality since 1874." This reinforced Plaintiffs' belief in the silo and confirmed their belief in AOS, the company behind the product.

(l) Volume 21, number 3 (June, 1982) at page 19. It is falsely stated that "in a Harvestore structure, the breather

system prevents the free access of air, protecting high moisture grain and other feeds from mold and spoilage by creating an oxygen limited environment that keeps mold spores dormant". At page 10 of that same magazine is the statement that "A.O. Smith Harvestore has a backing of a company known for quality since 1874. " It also has a coupon for obtaining a mailed copy of the brochure "The Harvestore System."

(m) Volume 21, number 5 (October, 1982) page 4 has a advertisement which states that Harvestore has the backing of a company known for quality since 1874 and has a mail in coupon for the "Harvestore System" brochure. A similar add appears at pages 24, 10 and 2.

(n) Volume 22, number 1 (February, 1983) at pages 4 and 24 are ads similar to those referred to in the immediately preceding subparagraph.

(o) Volume 22, number 3 (June, 1983) at page 22 is an ad which states that "the Harvestore has the backing of a company known for quality since 1874 and has a mail in coupon for the "Harvestore System" brochure, which contains false representations (See Paragraph 16(g)).

(p) Volume 22, number 5 (October, 1983) at page 4 is an advertisement indicating that A.O. Smith Harvestore wrote the book on oxygen limiting storage systems more than 30 years ago and stating that Harvestore structures are oxygen limiting. This advertisement also has a mail in coupon for the "Harvestore System" brochure, which contains false representations (See Paragraph 16(g)).

(q) Plaintiffs received, in the mail as part of the Harvestore System Farming magazine, in August 1982,



October 1982, February 1983, April 1983, June 1983, August 1983, and October 1983, after the sale of the Harvestore silo, an advertisement entitled, "Your Harvestore Dealer, Count on Him", which was made and published by A.O. Smith and AOSHPI and referred to the dealer as being a partner to provide counseling, service, and had an inventory of any repair parts that were necessary. This caused Plaintiffs to rely on the dealer and if Plaintiffs did have any problems with the silo, were assured that the dealer would be in telephone contact with A.O. Smith, who would be able to answer any problems. Plaintiffs now know that A.O. Smith and AOSHPI kept important and material information from the dealers regarding the alleged "oxygen-limiting" design and performance of Harvestore silos. This conduct prevented Plaintiffs from learning the truth about Harvestore silos, and caused them to continue to use such silo, to their detriment.

(r) In June 1982, Plaintiffs received, in the mail, the "Harvestore System Farming" (Vol 21, #3) magazine, which on page 9, contains an advertisement entitled, "They're Built Like They'd Last Forever". This advertisement falsely states that Harvestore silos have the backing of a company that has been in business since 1874, and claims that Harvestore silos are oxygen-limiting. This advertisement caused the Plaintiffs to be very confident in their Harvestore silo and never thought to question the Harvestore silo as a source of any problems. Said advertisement also contains mail-in coupons for farmers to obtain and receive more information, relative to Harvestore silos.

(s) Volume 24, number 4, (November 1985) has an ad entitled "Here's How We're Working Today... ". This advertisement states that the independent Harvestore system dealers share the commitment to providing the best possible products and services to animal agriculture. It further states,

that "every dealer pledges to uphold our standards when your Harvestore equipment is installed ... and to provide skilled service and quality parts to keep it running for the years to come."

(t) Volume 25, number 1 (Spring 1986) has an article entitled "Responding to Change". The above article was a summary of a North American dealer personnel meeting held in Chicago, Illinois. The speakers included Jack Estes, President of AOSHPI, and James Schaap, Executive Vice-President of AOSHPI. Mr. Schaap informed the dealer personnel that Harvestore was making new marketing decisions, which would support dealer business strategies and significantly improve Harvestores financial performance. Mr. Schaap assured the dealers that Harvestore would continue the existence of the dealer organization.

(u) Volume 25, number 1 (Spring 1986) has an ad entitled "Here's How We're Working Today...". This ad is identical to the ad identified in paragraph 11(s).

(v) Volume 27, number 2 (Fall 1988) has an ad entitled "Branded Parts". This ad encourages the farmer to contact their "independent Harvestore System dealer" to obtain factory bulletins, that no one else has access to. It further states that the Harvestore dealer is ready to serve the farmer "in every way possible, with management and planning advice, sales and service." Plaintiffs believed the dealer had access to all the research in the hands of Defendants and no one else did. Plaintiffs continued to believe in the design of the silo and also believed in the dealer being able to answer any and all questions concerning operation and management of the silo.

(w) Volume 28, number 2 (Fall 1989) this ad celebrates the 40th anniversary of AOSHPI, which confuses any

distinction between AOS and AOSHPI, since AOSHPI was not incorporated until 1961. It states the dealer is ready to serve the farmer in every way possible with management and planning advice, sales, and service. Plaintiffs continued to believe "A.O. Smith" was a single company and Harvestore was a product line. Plaintiffs continued to believe the dealer (MVBA) was a single source for all information on Harvestore silos. Plaintiffs never doubted the design of the Harvestore silo as a result.

#### HOARD'S DAIRYMAN

(x) Page 393 of the March 25, 1976 issue has an advertisement entitled "Alfalfa and Harvestore... Great Together". This ad falsely states the breather bag system inside the structure allows for the expansion and contraction of gases without admitting excess oxygen. It falsely states that stored feed remains moist and palatable and that spoilage due to oxidation is kept to a minimum. It also states that the feed value of stored forage preserves its value for months. This ad also contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(y) The issue of July 10, 1978 on the back cover has an advertisement entitled "If You're Not Looking Forward to Another Winter of Chopping Frozen Silage...You're Ready". It fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(z) In 1981-82, Plaintiffs received another advertisement in the mail, in a farm magazine, entitled, How to Produce More Milk From Your Acres", (In Hoards Dairyman magazine, May 10, 1982, page 703; March 10, 1982, page

391.) and/or "How to Produce more Milk at Less Cost" (the latter being set out at Vol. 21, #5, page 2 of the "Harvestore System Farming," and also in Hoards Dairyman, August 10, 1982, page 974; August 25, 1982, page 1079.) said ads being made and published by A.O. Smith and AOSHPI. These state that Harvestore silos are oxygen-limiting and have the backing of a company in business since 1874. Plaintiffs were caused by these advertisements to be confident in their Harvestore silo, and never thought to question such silo as a source for any problems on their farm. Said advertisement also contains a coupon to mail in to A.O. Smith Harvestore Products to obtain information in the form of a further brochure entitled, "The Harvestore System", referred to hereafter. (See paragraph 16(g).)

(aa) Plaintiffs received in the mail, Hoards Dairyman magazine July 25, 1984, page 850 and March 25, 1984, page 407, a further advertisement entitled, "It Wasn't a Question of Cost", made and published by A.O. Smith and AOSHPI, which indicated that everyone was making money with Harvestore silos. This caused Plaintiffs to believe that they had made the right choice and that they were making money with their Harvestore silo. Plaintiffs could not conceive that the Harvestore silo could be the source of any problems or damage on their farm.

(bb) On page 626 of the August 25, 1989 issue there is an ad entitled "The Inside Story". This ad states that the breather bag system reduces spoilage by limiting oxygen contact thereby implying that feed stored in a Harvestore is superior to feed stored in other types of storage systems. Fails to warn potential customers of inherent risks of using Harvestore silos. (See paragraph 26.) There is a discussion of the "Dealer Network" which states that the dealer is "ready in every way possible with information and service." This is a lie because



no dealers, including MVBA, have knowledge of the internal research and memoranda of Defendants outlined in paragraph 26. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(cc) On page 772 of the October 25, 1989 issue there is an ad entitled "The Inside Story". This ad is identical to the ad identified in paragraph 15(bb) above except it has a coupon relating to additional information regarding a Seminar in the Sun on February 25-28, 1990 in Las Vegas.

16. That after the purchase of the Harvestore silo, Plaintiffs attended fairs, shows, and meetings at MVBA at which literature and films, (including those set out at Paragraph 10b) produced by Defendants were distributed and were shown, and also received information through the U.S. Mail which included the following:

(a) At the time of construction of Plaintiffs' silo in the Spring of 1975, at Plaintiffs' farm, Plaintiffs were presented with a Harvestore structure operator's manual that was in written form and published and/or prepared by AOSHPI and A.O. Smith. Such manual states, on Page 7, that a Harvestore prevents oxygen from coming into contact with the feed. On Page 8 thereof, and also on Page 26, are false representations which indicate that AOSHPI is a division of A.O. Smith. It states that the dealers job "just begins" when the silo is constructed, and that Plaintiffs have continued access to expert counseling from the dealer. Plaintiffs relied on this manual for continued use and operation of the Harvestore silo, continued to believe that Harvestore silos prevented oxygen from coming into contact with the feed, and continued to believe that A.O. Smith was a single company, and was backing the product.

(b) Sometime after 1977, Plaintiffs received, through the U.S. Mail from either MVBA or AOSHPI a brochure entitled, "Here's Why the Harvestore System Provides the Best Feed Management Technology". This brochure was written and was made and published by AOSHPI and A.O. Smith. This brochure contains false representations that Harvestore silos are oxygen limiting (Page 3), that the breather system keeps air out (Page 6), that the Harvestore protects the feed from oxygen throughout the normal temperature ranges in North America (Page 7), creates confusion concerning A.O. Smith and AOSHPI (Pages 8, 11, 16), that Harvestores have a "bottom sealer system", with "doors designed to keep air out", and that sealant is used to prevent leaks (Pages 13, 16, 20). This brochure caused Plaintiffs to believe in the oxygen limiting system of Harvestore so that they never questioned the design of the silo, and continued to use the silo to their detriment. They also believed that the Harvestore was backed by a reliable, century-old company, and as a result of these misrepresentations, never believed that any problems on their farm could be due to the Harvestore silo.

(c) After 1978, Plaintiffs received by U.S. Mail, and at either the Minnesota State Fair or from MVBA, a brochure entitled "Harvestore System Haylage", made and published by A.O. Smith and AOSHPI, which ad falsely states, at Page 2, that the Harvestore silos are oxygen-limiting, and at Page 4, that Harvestore feed is protected from storage losses. Plaintiffs were damaged in that they relied upon said ad and believed that Harvestore haylage could not cause a problem on their farm, caused the Plaintiffs to look elsewhere for a source of any problems on their farm, and caused them to continue to use the Harvestore silo to their detriment.

(d) After 1976, Plaintiffs received in the U.S. Mail, at their home, a brochure entitled, "Research Report on Grain, a



Complete Short Course in Print", which was made and published by A.O. Smith and AOSHPI. Such brochure falsely states, at Page 24, that any oxygen in the silo is quickly used up by fermentation and that no oxygen thereafter will harm the feed. It also falsely states that unloader doors are designed to exclude air. As a result of reviewing this advertisement, Plaintiffs believed the Harvestore was the best silo on the market, and did not question the design of the Harvestore silo, but rather questioned their own management of their farm and, to the extent there were any problems with feed from the Harvestore, to look for repairable defects in the silo.

(e) In 1983, in the U.S. Mail, Plaintiffs received, "A Product Guide for 1983", made and published by A.O. Smith and AOSHPI. Plaintiffs believe this came in the mail along with one or more of the "Harvestore System Farming" magazines that were mailed in 1983. Said brochure falsely states that Harvestore silos are oxygen limiting, protected from the free access of air by a breather system that prevents spoilage, and that the breather bags expand and contract so that outside air doesn't have to enter (Page 4). On Page 5, there is a photograph of the breather system, which has no reference to the relief valve. On the last two pages of said brochure, it falsely states that the Harvestore dealer is a "partner", Plaintiffs could rely on the dealer for any parts, service, or answering any questions relative to the Harvestore silo. This is false in that the Harvestore dealers had no knowledge of internal studies of A. O. Smith and AOSHPI, which revealed design flaws in Harvestore silos. This brochure continued to convince Plaintiffs that no air could enter the Harvestore silo, except through the breather bags, and very little could come in through the unloader door that was designed to exclude air. Plaintiffs thus continued to use the silo to their detriment.

(f) After 1974, Plaintiffs received from AOSHPI, in the U.S. Mail, a brochure entitled "Haylage, a Complete Short Course in Print", which was made and published by A.O. Smith and AOSHPI. Said ad falsely states, at Page 11, that if there was no oxygen, there would be no mold in oxygen-limited systems. At Page 23-24, there is reference to A.O. Smith engineers wanting to build an "air tight silo", and a claim that in oxygen-limited storage, a breather bag system eliminates the slow penetration of air into the silage pack, and that Harvestore, silos are worth the increased price one must pay because of the oxygen-limiting features. This ad caused Plaintiffs to believe in the Harvestore silo, and the Plaintiffs did not question the silo and reaffirmed their faith in the Harvestore System. Plaintiffs continued to use the Harvestore silo to their detriment.

(g) Plaintiffs received a brochure in the U.S. Mail, on several occasions after 1978 and also at fairs and at MVBA meetings, a brochure entitled, "The Harvestore System", made and published by A.O. Smith and AOSHPI. Said ad falsely states, at Page 5, that Harvestore silos are oxygen-limiting and prevent oxygen from contacting the feed. Pictures of the breather bag system do not show the pressure relief valve, and suggests air does not get into the unloader door because of "marine type hatches". Said ad further suggests, on Page 6, that "A.O. Smith" engineers are backing the product because it was their specifications that were used in connection with designing the product. It states that the Harvestore Systems dealer "stands behind every structure with a wide range of important services" such as feedlot planning, cropping programs, ration formulation, farm management and "many opportunities for you to expand your Harvestore system farming skills, through educational meetings, seminars, tours, films and printed materials". Plaintiffs were convinced that they had purchased the best possible design of a silo that was

then available and that they had the backing, of a single company that had been in business for many years that had carefully researched the product and had rigid specifications for quality control. Plaintiffs believed that all of the Defendants' knowledge was available from the dealer, MVBA.

(h) In 1979, Defendants, through numerous letters and communications by U.S. Mail, instituted a "resealer" program, ostensibly designed to seal up holes in between the steel sheets, but, in fact, intended to cause farmers to continue to believe in the design of the silo and thus dissuade them from pursuing claims based upon product design, and causing Plaintiffs and other farmers similarly situated to look elsewhere for a source of problems on their farm. Plaintiffs 25 x 80 silo was resealed under this program on June 2, 1982. Defendants mailed information about the resealer program to MVBA (See D.M. 138 (Rev 1-18)). MVBA and Defendants corresponded in the U.S. Mail about resealing Plaintiffs 25 x 80 silo on June 28, 1982. (D 1818 AOSHPI #84568). AOS Product Service Division approved the resealer warranty claim on July 20, 1982, and notified MVBA by U.S. Mail.

(i) BIRTH OF A HARVESTORE-FILM

This is a film seen on several occasions after the sale of the silo at MVBA. Makes a reference to the Corporation's vast Milwaukee facility. States that the breather bag concept allows controlled fermentation, and bottom unloading concept allows controlled fermentation. States the famous Harvestore breather bag system allows the structure to breathe while preventing harmful oxygen from contacting the feed. There is a depiction of the Harvestore silo with no breather valve. It states that the purchase of a Harvestore silo "is only the first link in an ongoing bond" between the farmer and the dealer. It says the salesman will meet with the farmer after the sale to

provide the latest scientific information. The film caused the Plaintiffs to continue to believe in the design of the Harvestore silo, caused them to believe that MVBA was a source for scientific information on the Harvestore silo, and thereby caused the Plaintiffs to continue to use it to their detriment.

[Paragraphs 17-25 deleted]

26. At all times relevant to this matter AOSHPI and AOS separately and in concert knew that problems being experienced by Plaintiffs as well as other farmers similarly situated were related to the failure of the Harvestore structure to function as represented including, but not limited to the following:

(a) That the Harvestore structure had serious and irreparable design flaws relating to air coming in through the pressure relief valve and the unloader door. This knowledge is reflected in the following documents in the possession of Defendants: Burnside to Deringer 10-25-54; NPD 7006 (12-6-66); MR 7535 (6-14-68); NPD 7041 (11-20-72); NPD 1108 (2-7-67); NPD 7020 (1-30-69); Patent 3,332,336; patent 3,510,319; patent 2,643,602; NPD, 7038 (2-1-72); NPD 7045 (1-15-74); MR 7534 (6-7-68); NPD 7018 (10-22-68); MR 7541 (11-27-68); NPD, 7013 (3-14-68); NPD 7007 (12-15-66); MTD 7093 (12-23-80); NPD, 7009 (3-20-67); MR 7539 (10-31-68); NPD, 7030 (2-17-71); NPD, 7032 (9-7-71); MR 7549 (10-24-69); MR 7536 (6-25-68); NPD 1132; McMurray to Broberg 9-28-66; McGinn to named individuals (11-27-67); McGinn to Hyde (11-30-67); Unloader Air Intake Control Work Order (2-15-68); W.W. Smith to Warren (1-15-82); Jensen to Evers (8-11-69); Toepfneer to Slater (8-1-69); Dome Oxygen Meeting (1-25-82), H. Johnson to Lundgren (3-31-67).



(b) That the oxygen content in the dome space in the Harvestore structure reached that of ambient air within minutes of opening the unloader door with the unloader operating. This knowledge is reflected in the following documents in the possession of Defendants: NPD 7006 (12-6-66); NPD 7001 (1-25-64); NPD 7032 (9-7-71); MR 7549 (10-24-69).

(c) That AOS and AOSHPI had been warned repeatedly throughout the years by their own engineers and also by Harvestore dealers in the 1960's that design flaws existed in the silos and that the product was being falsely advertised to the farmer. This knowledge is reflected in the following documents in the possession of Defendants: R.C. Smith to J.J. Stahl (4-25-68); H. Johnson to J.J. Stahl (4-23-68); Burnside to Deringer 10-25-54; J.J. Stahl to H. Johnson (5-1-68); McMurray to Broberg (9-28-66); McGinn to named individuals (11-27-67); McGinn to Hyde (11-30-67); D.J. Johnson to Warren (1-29-82); Vetter to Vickerman (8-11-78); Vickerman to Warren (11-9-78); Dome Oxygen Meeting (11-25-82); Smith to Warren (1-15-82); Johnson to Smith - Tuxen Progress Report 55 (12-22-81); MR 7536 (6-25-68); NPD, 7032; NPD, 1132 (10-28-69); MTD 7093 (12-23-80); MR 7537 (9-24-68); NPD, 7018 (10-22-68); MR 7556 (12-16-70); MR 7534 (6-7-68); NPD 7007 (12-15-66); NPD, 7013 (3-14-68); MR 7082 (8-15-79); H. Johnson to Lundgren (3-31-67); William Johnson testimony (Kronebusch v. AOS). Mr. William Johnson was a Harvestore dealer in California. He went to the annual Harvestore dealers meeting in the Fall of 1964, (which, like all annual dealer's meetings, was scheduled and organized by Defendants) in Miami, Florida, and personally warned the CEO of AOSHPI, Arthur Hyde, of defects in the Harvestore silo and potential litigation. Getting no satisfaction from AOSHPI, Mr. Johnson then approached the president and counsel for AOS, L.B. Smith and John

Lundgren, in the Spring of 1965 at AOS Corporate Offices in Milwaukee, Wisconsin, and also personally warned them. Defendants subsequently removed silos from California and stopped sales in that State, but kept selling in other states, including Minnesota.

(d) That the pressure relief valve in a 25 x 80 Harvestore structure operates almost daily and allows outside air to enter the headspace of the structure and to come into direct contact with the feed. This knowledge is reflected in the following documents in possession of Defendants: NPD 7006 (12-6-66); NPD 7041 (11-20-72); NPD 7001 (11-25-64); NPD 7007 (12-15-66); NPD 7009 (3-20-67).

(e) That when the Harvestore structure is in a negative pressure situation, and the farmer opens the unloader door, the breather bags have a tendency to collapse, thereby drawing in the volume of the breather bags into the unloader. This knowledge is reflected in the following documents in the possession of Defendants: Invention Disclosure Sheet D.L. Landphair (5-26-70); McMurray to Broberg (9-28-66); NPD 7007 (12-15-66); MR 7503 (3-2-65); MR 7505 (9-8-65); MR 7517 (7-24-66); Patent 3,332,336; patent 3,510,319.

(f) That medium moisture forages, such as that placed in a Harvestore structure, were more susceptible to penetration by ambient air, higher temperature and encountered more dry matter loss in the field than higher moisture forages placed in a stave silo and are, thus, more susceptible to heat damage, mold and microbial development, and resulting feed spoilage, loss of nutrient value, and reduced animal performance. This knowledge is reflected in the following documents in the possession of Defendants: NPD 7042 (1-9-73); MR 7535 (6-14-68); NPD 7024 (1-22-70); MR 7562 (11-10-71); NPD 7044 (5-14-73); NPD, 7030 (2-17-71); Raymond to Reedal (2-24-



59); Vetter to Vickerman (8-11-78); Dome Oxygen Meeting (1-25-82); Warren to Landphair (4-23-75); MTD 7093 (12-2380); NPD 7007 (12-15-66); MR 7501 (2-23-65); MR 7531 (4-17-68); Winning System (pages 7, 11, 47).

(g) That a dome is created beneath the feed in a Harvestore structure, which dome is of a variable size and makes it impossible to feed from the face of the feed mass in a uniform fashion so as to keep ahead of oxidation of the feed. This knowledge is reflected in the following documents in the possession of Defendants: NPD 7007 (12-15-66).

(h) That oxygen has access to a Harvestore structure in the headspace and in the dome area and that this occurs in ever increasing amounts, depending upon level of fill, temperature, pressure and other variables not within the control of the farmer. This knowledge is reflected in the following documents in the possession of Defendants: NPD 1132 (10-28-69); EL 1102 (4-25-62); NPD 0005 (11-1-65); NPD 0001 (12-21-64); NPD 7020 (1-30-69); NPD 7009 (3-20-67); NPD 7013 (3-14-68); NPD, 7006 (12-6-66); NPD 7007 (12-15-66); MTD 7093 (12-23-80); Heffington Memo (1-6-75); H. Johnson to Lundgren (3-31-67); Patent number 2,643,602.

(i) That on January 3, 1968, the general counsel of AOS (who at the same time was general counsel and on the Board of Directors of AOSHPI) sent a directive to both AOS and AOSHPI setting forth a scheme to conceal known defects in Harvestores. The object of this scheme was to direct ordinary engineering and other memos, reports, advertising, documents to the law department at AOS so that such documents could falsely obtain the mantle of attorney/client privilege when, in fact, they were not entitled to such privilege. Such directive also constitutes an admission of Defendants AOS and

AOSHPI that there were problems with the Harvestore silo that were "far from solution."

(j) That the Harvestore structure caused a rise in temperature of the feed mass, increasing the risks of heat damage, molding, microbial development and other degradation of the feed and loss of nutrients. This knowledge is reflected in the following documents in the possession of Defendants: NPD 7026 (10-3076); NPD 7041 (11-20-72); NPD 7037 (12-30-71); NPD 7038 (2-1-72); NPD 7045 (1-15-74); MR 7531 (4-17-68); MR 7537 (9-24-68); Vickerman to Warren (11-9-68); D. G. Johnson to Warren (1-29-82); Dome Oxygen Meeting (1-25-82); Warren to Landphair (4-23-75); Johnson to Smith - Tuxen Progress Report 55 (12-22-81); NPD 7033 (11-30-71); NPD 7027 (12-7-70); NPD 7042 (1-9-73); MR 7535 (6-14-68); NPD 7024 (1-22-70); NPD 7047 (2-28-74); MTD 7093 (12-23-80).

The above referenced material design flaws were and continue to be fraudulently concealed by AOS and AOSHPI, not only from the Plaintiffs and other farmers throughout the country, independently and through the use of and in association with MVBA, but also from the Dealer Organization, MVBA and other dealers and salesmen of Harvestore structures. The active concealment from the dealer organization, including MVBA, of these material omissions permitted the Defendants to perpetrate the fraud on a very large scale. The dealer salesmen were required to attend organized training sessions, given by AOSHPI, on how to sell Harvestore silos, the design of the silos, and how to deal with customer objections, but were never informed of the internal research conducted by these Defendants. The farmers were repeatedly falsely advised in the ads (see Paragraphs 10, 11, 15, 16 and 63), that the dealer was a source for answers to all questions and problems concerning Harvestore silos.

MVBA and the "Dealer Organization" thereby unknowingly continued to perpetrate the fraud, while, at the same time, acting as a buffer and shield between the Plaintiffs, and other farmers, on the one hand, and the Defendants, on the other hand.

[Paragraphs 27-96 deleted]

WHEREFORE, Plaintiffs request this Court to enter a judgment in their favor and against Defendants for an amount not less than \$50,000.00 and in a sum three times the actual damages proved at trial, attorney fees, costs and disbursements, and reasonable expenses for investigation, interest and that the court (a) enjoin all unlawful practices, (b) and enjoin the sale of Harvestore silos, and (c) require that the Defendants publish to Harvestore farmers information concerning known product defects.

Dated this 26th day of November, 1993.

BIRD AND JACOBSEN

(2)

Supreme Court U.S.

FILED

NOV 25 1996

No. 96-663

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In the  
**Supreme Court of the United States**  
October Term, 1996

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MARVIN KLEHR and MARY KLEHR

*Petitioners,*

v.

A.O. SMITH CORPORATION and  
A.O. SMITH HARVESTORE PRODUCTS, INC.,

*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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**RESPONDENTS'  
BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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38 pp



### QUESTIONS PRESENTED

1. Where a petition for rehearing in the court of appeals was not timely filed within 14 days after the entry of judgment and the petition for writ of certiorari is filed more than 90 days after the entry of judgment below, does this Court lack jurisdiction to consider the petition for writ of certiorari?

2. Where Petitioners simultaneously knew or should have known of the existence and source of their injuries and that their injuries were part of a pattern of racketeering activity thirteen or more years before commencing their civil RICO action, may they nonetheless maintain a cause of action under RICO for qualitatively identical injuries resulting from the same pattern of racketeering activity occurring within the four year limitations period?

## **RULE 29.6 LISTING**

### **A.O. SMITH CORPORATION**

The following companies are nonwholly owned subsidiaries of Respondent A.O. Smith Corporation:

- A.O. Smith Electric Motors, Ltd. (Ireland)
- A.O. Smith Holdings, Ltd. (Ireland)
- Changchun A.O. Smith Golden Ring Automotive Products Co., Ltd. (China)
- Claymore Insurance Co. (Bermuda)
- Harbin A.O. Smith Fiberglass Products Company Limited (HSF) (China)
- Metalsa, S.A. de C.V. (Mexico)
- Motores Electricos de Juarez, S.A. de C.V. (Mexico)
- Motores Electricos de Monterey, S.A. de C.V. (Mexico)
- Nanjing A.O. Smith Water Heater Co., Ltd. (China)
- Productos de Agua, S.A. de C.V. (Mexico)
- Productos Electricos Aplicados, S.A. de C.V. (Mexico)

A.O. Smith Corporation has no parent company.

### **A.O. SMITH HARVESTORE PRODUCTS, INC.**

A.O. Smith Harvestore Products, Inc. has no nonwholly owned subsidiaries.

A.O. Smith Harvestore Products, Inc.'s parent company is respondent A.O. Smith Corporation.

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Respondents A.O. Smith Corporation and A.O. Smith Harvestore Products, Inc. respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in this case. That opinion is reported at 87 F.3d 231 (8th Cir. 1996). (Pet'r App. A-1 - A-17)

#### JURISDICTION

Judgment was entered in the Eighth Circuit on June 6, 1996. An untimely petition for rehearing was received in the Eighth Circuit on June 21, 1996, more than 14 days after the entry of judgment. On July 29, 1996, the Eighth Circuit issued an Order denying the untimely petition for rehearing.

The instant petition was filed on October 25, 1996, more than 90 days after the entry of judgment in the court of appeals. The period for applying for a writ of certiorari has not been extended by a Justice of this Court. See 28 U.S.C. § 2101(c); Sup. Ct. R. 13.5.

#### STATUTES OR OTHER PROVISIONS INVOLVED

28 U.S.C. § 2101(c) provides:

**§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay**

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

## STATEMENT OF THE CASE

Petitioners' lengthy statement of the case contains numerous misstatements of fact, inaccurate characterizations of the opinions of the courts below and plain argument. The facts of the case are concisely stated in the decisions of the courts below, and Respondents incorporate by reference the facts as stated therein. (Pet'r App. at A-1 - A-17; B-1 - B-20.) In addition, however, pursuant to Supreme Court Rule 15.2, Respondents are obligated to point out certain specific misstatements in the petition.

Petitioners were not "duped" by Respondents' alleged post-sale predicate acts into believing their Harvestore silo functioned as represented or was the "cadillac" of silos. (*Contra* Pet. at 6.) Petitioners were aware as early as 1976 that they were encountering problems directly contrary to Respondents' representations concerning the benefits of the silo, and that the silo was not performing as represented. (Pet'r App. at A-2 - A-9.)

No predicate acts occurred within four years of commencement of the lawsuit which made any new or different claims than the pre-1989 predicate acts described in the Petitioners' Amended Complaint. (*Contra* Pet. at 6.) The alleged predicate acts occurring after August 27, 1989 contain the same general representations contained in the 50 or more previous predicate acts alleged in the Amended Complaint, all of which occurred more than four years before commencement of this lawsuit. (Pet'r App. at G-2 - G-25.)

Petitioners did in fact see mold in the feed that was fed to their livestock, and were able to see mold coming out of the silo with the naked eye. (*Contra* Pet. at 7.) Petitioners admitted that they observed mold in their feed every year from 1976 through 1991, and they knew that mold and spoilage in feed was caused by exposure to oxygen and was harmful to their dairy cattle. (Pet'r App. at A-2 - A-6.)

The court below specifically addressed Petitioners' argument that continuing predicate acts within four years of commencement of the lawsuit proximately caused their alleged "continuing new damages." (*Contra* Pet. at 9.) The Eighth Circuit rejected Petitioners' argument to "adopt a 'separate accrual rule,' which would permit them to recover damages for predicate acts that occur within the limitations period, even if their claim for similar damages caused by similar predicate acts outside of the four-year period are time-barred." (Pet'r App. at A-16) The court reasoned that such an "open-ended" standard was inconsistent with the underlying policy of a statute of limitations requiring due diligence on the part of the plaintiff. (*Id.*)

The court below also considered Petitioners' argument that Respondents prevented Petitioners from discovering internal research contradicting the advertising claims allegedly made by the Respondents. (*Contra* Pet. at 9.) The Eighth Circuit rejected this argument, noting that the limitations period would not wait to run until Petitioners were able to pinpoint a design flaw that prevented the silo from performing as represented. (Pet'r App. at A-11.) The Eighth Circuit further held that Petitioners made no showing that Respondents concealed facts giving rise to the alleged cause of action. (*Id.* at A-12 - A-13.)



## REASONS FOR DENYING THE WRIT

### **I. THE COURT LACKS JURISDICTION TO CONSIDER THE PETITION FOR WRIT OF CERTIORARI BECAUSE A PETITION FOR REHEARING WAS NOT TIMELY FILED IN THE COURT OF APPEALS, AND THE PETITION FOR WRIT OF CERTIORARI WAS FILED 141 DAYS AFTER JUDGMENT WAS ENTERED BELOW.**

This Court lacks jurisdiction to entertain the petition for writ of certiorari because Petitioners' petition for rehearing was not timely filed in the Eighth Circuit, and the petition for writ of certiorari was filed 141 days after judgment was entered below.

A petition for writ of certiorari must be filed within ninety days after the entry of judgment in the court of appeals. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1. This 90-day time limit is "mandatory and jurisdictional." *Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537, 539 (1994) (citing *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990)). This Court has "no authority to extend the period for filing except as Congress permits." *Jenkins*, 495 U.S. at 45. Unless a petition for writ of certiorari is filed within ninety days after the entry of judgment in the court of appeals, this Court "must dismiss the petition." *Id.*

While a "timely" petition for rehearing presented to the court of appeals may toll the start of the 90-day period in which a petition for writ of certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing, such a petition for rehearing must be "timely" filed to extend the filing period for certiorari. *Jenkins*, 495 U.S. at 45-46; Sup. Ct. R. 13.3. Supreme Court Rule 13.3 states:

The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But *if a petition for rehearing is timely filed* in a lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. A suggestion made to the United States court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of this Rule unless so treated by the United States court of appeals.

Sup. Ct. R. 13.3 (emphasis added).

The timeliness of a petition for rehearing in the court of appeals is governed by Rule 40(a) of the Federal Rules of Appellate Procedure, which states that a "petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." Fed. R. App. P. 40(a). The method by which a petition for rehearing may be "filed" is prescribed by Rule 25(a), which states in relevant part: "[F]iling is not timely unless the clerk *receives* the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing. ..." Fed. R. App. P. 25(a) (emphasis added). Under this Rule, a petition for rehearing, being neither a brief nor an appendix, is not deemed filed until it is *received* by the clerk of court; simply placing the papers in the mail is legally insufficient. *Id.*

In this case, the petition for rehearing was untimely because it was not received, and therefore was not filed, within 14 days after entry of judgment. Judgment was entered below on June 6, 1996 when the Eighth Circuit issued its opinion. (Resp't App. at A-9.) Petitioners had 14 days thereafter, or until June 20, 1996,

to file their petition for rehearing. It is undisputed that the petition for rehearing was "received untimely" on June 21, 1996, more than fourteen days after entry of judgment. (*Id.*) Since it was not received by the clerk within fourteen days after entry of judgment, it was not timely filed under Rule 25(a). The "untimely petition" was denied by the Eighth Circuit on July 29, 1996. (*Id.*)

Because the petition for rehearing was not timely filed within 14 days after entry of judgment and the time for filing was not enlarged by order or local rule, the 90-day period for filing the petition for writ of certiorari began to run when judgment was entered on June 6, 1996, not on July 29, 1996 when the untimely petition for rehearing was denied. See Sup. Ct. R. 13.3. Accordingly, the time within which to file this petition expired on September 4, 1996. This petition was filed 51 days after the time period prescribed by Congress and the Rules of this Court.

Although the Eighth Circuit's order denying the petition for rehearing does not state, on its face, that the petition was denied because it was untimely, its failure to so note does not somehow render the clearly untimely petition timely. The General Docket makes clear that the Eighth Circuit determined the petition to be untimely: it notes that the court "received untimely petition for rehearing" on June 21, 1996, and describes the court's July 29, 1996 order as "denying untimely petition for panel rehearing." (Resp't App. at A-9 (emphasis added).) Moreover, since the petition for rehearing was not timely filed within fourteen days after entry of judgment, no subsequent order of the court of appeals can extend the time for filing a petition for writ of certiorari. See *Jenkins*, 495 U.S. at 45 (stating that "we have no authority to extend the period for filing [a petition for certiorari] except as Congress permits"); *Allegrucci v. United States*, 372 U.S. 954 (1963) (denying certiorari "for the reason that the petition was not timely filed," despite action of court of appeals in entertaining out-of-time petition for rehearing and in denying that petition for rehearing "after due consideration"); *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S.

206, 211-13 (1952) (stating that time to seek rehearing or review of judgment cannot be enlarged by lower court in its discretion and explaining that statutes limiting Supreme Court's jurisdiction to cases where review is sought within prescribed time period do not permit tolling of time limitations because of events in lower court which do not affect substance of judgment to be considered on review); *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942) (holding that petition for certiorari filed outside prescribed filing period following entry of judgment in lower court "must ... be denied for want of jurisdiction," despite lower court's order subsequent to entry of judgment and within the prescribed filing period purporting to amend final order) (per curiam); *Chin Gum v. United States*, 150 F.2d 765, 766 (1st Cir. 1945) (explaining that denial of petition for rehearing filed out of time by leave of court "did not operate to revive the already expired jurisdiction of the supreme court to entertain a petition for certiorari") (per curiam); Stern, et al., *Supreme Court Practice* 279 (7th ed. 1993).<sup>1</sup>

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<sup>1</sup> From previous communications with Petitioners' counsel, Respondents anticipate that Petitioners may argue in reply that the court of appeals effectively extended the time for filing their petition by accepting their untimely petition for rehearing, considering it on the merits, and then denying it. This argument is factually and legally incorrect. The Eighth Circuit did not dispose of Petitioners' untimely petition for rehearing on the merits. Rather, the court's order states that "[t]he petition for rehearing filed by the appellants' [sic] has been considered by the court and is denied." (Pet'r App. at C-1.) The Eighth Circuit's General Docket sheet explains that, upon consideration, the court found the petition to be "untimely," and accordingly, it was denied. (Resp't App. at A-9.) The Eighth Circuit "considered" the petition only to determine whether it was timely and did not reach its merits. Therefore, the 90-day time limit was not tolled. See *Pfister v. Northern Illinois Fin. Corp.*, 317 U.S. 144, 150 (1942).



The petition for rehearing below was not timely filed. Accordingly, the Court should dismiss the petition for writ of certiorari for lack of jurisdiction.

## II. THE OPINION OF THE COURT OF APPEALS IS CORRECT AS A MATTER OF LAW, AND IS NOT IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS

The Eighth Circuit affirmed the dismissal of Petitioners' civil RICO claims, correctly concluding that the claims were time-barred based on the damaging admissions made by the Petitioners in their sworn deposition testimony and pleadings below. Employing an "injury plus pattern" discovery accrual rule, the Eighth Circuit correctly determined, based on the specific facts of this case, that Petitioners knew, or through the exercise of

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(... continued)

Petitioners' anticipated argument also fails legally because the court of appeals cannot extend the 90-day jurisdictional limit established by Congress by "considering" an untimely petition for rehearing. *Pink*, 317 U.S. at 268. Petitioners apparently are confusing the strict jurisdictional limits imposed by Congress on this Court's power to entertain petitions for writ of certiorari with the unqualified discretion once vested in the district courts, sitting as courts of equity, to accept untimely petitions to review the administrative decisions of bankruptcy referees. See *Pfister*, 317 U.S. at 152-53 (holding that a bankruptcy court has the power to permit untimely petition for rehearing of bankruptcy referee's order where the statute prescribing the time for filing petitions was "not ... intended to be a limitation on the sound discretion of the bankruptcy court to permit the filing of petitions for review after the expiration of the period," since Congress had "unqualifiedly given" bankruptcy court power to review referee's order); *Bowman v. Loperena*, 311 U.S. 262 (1940) (same). These cases stand in sharp contrast to the "mandatory and jurisdictional" time limits imposed by Congress for filing a petition for writ of certiorari to this Court. See *NRA Political Victory Fund*, 115 S. Ct. at 539; *Jenkins*, 495 U.S. at 45.

reasonable diligence should have known, of their injuries, the source of their injuries and that their injuries were part of a pattern of suspected racketeering activity "long before" August 27, 1989, four years before the commencement of their lawsuit. (Pet'r App. at A-15 - A-17.) The Eighth Circuit also correctly determined, based on conceded facts, that the Petitioners should have discovered their injury, its source and the predicate acts which formed the "pattern" *simultaneously*, soon after they began using their silo in 1975. (*Id.* at A-15.) The predicate acts described in the Amended Complaint which occurred within the four year limitations period were correctly found by the court to be part of the same pattern which Petitioners should have discovered soon after they purchased the silo, and the "continuing damage" occurring within the four-year limitations period was found to be qualitatively indistinguishable from the "single, continuous injury" sustained over the previous fifteen years. (*Id.* at A-16 - A-17.)

The Eighth Circuit's conclusions described above are overwhelmingly supported by the uncontroverted facts in the record and are not challenged in this petition. Based on these undisputed facts, no court of appeals would have reached an outcome different than the one reached by the Eighth Circuit here. Whatever theoretical distinctions may exist between the discovery accrual standards articulated by the various circuits, their application to the unique facts in this case dictate a uniform result. This case presents no opportunity for this Court to pronounce anything more than what is already clearly established: once a plaintiff discovers his injury, its source and a pattern of racketeering, he has four years to bring a civil RICO action; claims for identical injuries resulting from the same previously-discovered pattern of activity are not separately actionable under civil RICO.



**A. The Courts of Appeals are Not in Conflict Regarding the Date of Accrual of a Civil RICO Claim, Where the Plaintiff Simultaneously Discovers His Injury, its Source and the Predicate Acts Forming the Pattern of Racketeering Activity More Than Four Years Before Commencement of the Lawsuit.**

Under the Eighth Circuit's "injury plus pattern" discovery accrual rule, a civil RICO cause of action accrues "as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern." (Pet'r App. at A-14.) The Eighth Circuit standard is identical to the discovery accrual rule adopted by the Sixth, Tenth and Eleventh Circuits. See *Caproni v. Prudential Sec., Inc.*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817, 820-21 & n.2 (10th Cir. 1990); *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991). Applying this standard to the facts in this case, the Eighth Circuit held (and Petitioners here do not challenge) that the Petitioners should have known some time in the 1970s that the Respondents' representations concerning the Harvestore silo were not true, and therefore should have recognized the existence and source of their injury. Similarly, because Petitioners had received dozens of promotional advertisements in the mail both before and after purchasing the silo, the court found they should have known that the allegedly fraudulent advertising constituted a pattern at the same time they should have identified the Harvestore as the cause and source of their problems. (Pet'r App. at A-15; *accord Agristor Fin. Corp. v. VanSickle*, 967 F.2d 233, 241-42 (6th Cir. 1992) (holding in a virtually identical RICO case against Respondents that "as a matter of law, [the plaintiff] should have determined that the representations were part of a pattern at the same time it should have discovered that the silos caused the

alleged problems on the dairy farm"); *Bath*, 913 F.2d at 821 n.2 (stating that merely because "a plaintiff can identify one predicate act that occurred within four years of the filing of the complaint" does not render irrelevant "the question of when the plaintiff discovered, or should have discovered that his injury was part of a pattern of racketeering activity"); *Bivens*, 906 F.2d at 1554-55 (rejecting argument that because plaintiff could identify one or more predicate acts occurring within four years of filing the complaint, their civil RICO claim did not accrue; the appropriate question is "when each plaintiff knew or should have known that his injuries were part of a pattern").

Petitioners' claim would fare no better under the "injury discovery" accrual rule. Under this standard, the civil RICO limitations period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action. See, e.g., *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir.), *cert. granted*, 116 S. Ct. 2521 (1996); *Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-66 (1st Cir. 1990) (Breyer, C.J.); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel*, 828 F.2d 211, 220 (4th Cir. 1987); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992). Under the "injury discovery" accrual rule, Petitioners' claims clearly would be time-barred. As noted by the court below, Petitioners were aware of their injury and its source sometime in the 1970s, fifteen or more years before this lawsuit was commenced; Petitioners do not challenge that conclusion here.

Furthermore, while courts employing both "injury plus pattern" and "injury discovery" accrual rules have recognized that separate injuries may give rise to separate causes of action under RICO, this so-called "separate accrual" rule applies only to "new and independent" injuries; injuries which are qualitatively indistinguishable from previous injuries or which are merely a continuation of injuries naturally flowing from the same pattern of racketeering activity are not separately actionable and do not

recommence the civil RICO limitations period. See *Grimmett*, 75 F.3d at 513-514; *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995); *McCool*, 972 F.2d at 1465 n.10; *Glessner v. Kenny*, 952 F.2d 702, 708 (3d Cir. 1991); *Bivens Gardens Office Bldg.*, 906 F.2d at 1549-51; *Bankers Trust*, 859 F.2d at 1102-05.<sup>2</sup>

<sup>2</sup> For example, in *Grimmett*, 75 F.3d at 513-4, the Ninth Circuit found, as a matter of law, that the following events, all of which occurred within the four-year limitations period, were part of same fraudulent scheme to deprive plaintiff of her interest in defendant's medical practice, and did not constitute "new and independent" acts or injuries giving rise to a separate RICO limitations period: (1) mail fraud by submitting false documents to the bankruptcy court; (2) obstruction of justice by concealing documents and giving false deposition testimony; (3) defrauding a business partner in furtherance of the scheme; and (4) defrauding owners of a partnership by failing to disclose their full liability to plaintiff. Similarly, in *Glessner*, 952 F.2d at 708, the Third Circuit held that the cost of replacing a defective furnace did not constitute an independent injury separate and apart from the damage associated with excessive servicing and repairs so as to revive plaintiff's RICO cause of action. The court noted that "the mere continuation of damages into a later period will not serve to extend the statute of limitations." (*Id.*) In *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995), the Second Circuit, discussing its earlier decision in *LILCO v. Imo Indus., Inc.*, 6 F.3d 876 (2d Cir. 1993), noted that a plaintiff's civil RICO cause of action accrues upon discovery that a product is defective in derogation of contract and warranty rights; any additional financial losses resulting from the plaintiff's decision in that case to use and repair the defective product were not independent from the original injuries so as to recommence the RICO limitations period. (*Id.*) Cf. *Bivens Gardens Office Bldg.*, 906 F.2d at 1549-51 (independent injuries arose from defendant's wrongful takeover of hotel in 1975, diversion of assets in 1981 and wrongful sale of hotel in 1981; later injuries were "not included among the injuries that naturally flow" from wrongful takeover in 1975); *Bankers Trust*, 859 F.2d at 1102-05 (wrongful concealment of assets in bankruptcy proceeding, harassing lawsuits to prevent plaintiff from vacating fraudulently attained bankruptcy plan and later fraudulent conveyance of property held to be "independent" injuries subject to separate accrual.)

Consistent with precedent from other circuits, the Eighth Circuit correctly determined that the injuries alleged by Petitioners within the limitations period were identical to the injuries allegedly suffered over the preceding fifteen years, and were merely part of "one single, continuous injury that was sustained sometime in the 1970s and for which the limitations period commenced long before August 27, 1989." (Pet'r App. A-16 - A-17.) In the absence of "new and independent" injuries within the limitations period (which Petitioners do not assert), no court of appeals would have reached a conclusion different than the decision below.

Even under the so called "last predicate act" accrual rule employed by the Third Circuit, which Petitioners urge this Court to adopt, Petitioners' claim would be time-barred. The last predicate act rule was first articulated in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988), in response to a concern that the injury discovery accrual rule produced inequitable results "where a plaintiff may be injured by a single predicate act which is not followed by the other predicate act or acts necessary to create a 'pattern of racketeering activity' until some later time. ..." *Id.* at 1129. The Third Circuit therefore held that a civil RICO claim accrues when the plaintiff knew or should have known that the elements of a RICO claim existed unless, as part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, in which case the claim accrues upon discovery of the last injury or last predicate act that is part of the same pattern of activity. *Id.* at 1130. Since *Keystone*, the last predicate act rule has been roundly criticized by other courts as too "open-ended," prone to producing absurd and indefensible results and inconsistent with the principles of due diligence underlying the statute of limitations. See *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Rodriguez*, 917 F.2d at 666-67; *Bath*, 913 F.2d at 821 n.2; *Bivens*, 906 F.2d at 1554.



In subsequent decisions, the Third Circuit has considerably narrowed its holding in *Keystone*. In *Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991), the court noted that a civil RICO plaintiff's limitations period "must be measured from the time it knew or should have known of the *pattern of racketeering activity*." *Id.* at 706 (emphasis added). More recently, in *Davis v. Grusemeyer*, 996 F.2d 617 (3d Cir. 1993), the court specifically rejected the argument that knowledge of a pattern was insufficient to commence the limitations period unless the plaintiff knew of all the predicate acts that encompassed the pattern of racketeering activity: "[T]he question is not when [the plaintiff] knew each and every predicate act charged in the complaint, but when he knew or, with reasonable diligence, should have known that defendants' [predicate act] was *part of a developed pattern of racketeering*." *Id.* at 625 n.16 (emphasis added). Here, as noted by the Eighth Circuit, the Petitioners should have known that the allegedly fraudulent advertising constituted a pattern of racketeering activity sometime in the 1970s, having received more than 50 allegedly fraudulent advertisements in the mail before and after the purchase. (Pet'r App. at A-15.) Because the events giving rise to the Petitioners' discovery of the injuries, their source and the predicate acts forming the pattern of racketeering all occurred simultaneously, their claims would be time-barred even under the accrual rule employed in the Third Circuit. See *Davis*, 996 F.2d at 625 n.16; *Keystone*, 863 F.2d at 1130 (explaining that, in situations where all injuries and predicate acts which form the pattern occur simultaneously, the last predicate act rule and the injury discovery rule achieve the same result).

#### B. The *Grimmett* Case Will Not Affect the Outcome of this Action.

There is no reason to delay the denial of this petition for writ of certiorari pending this Court's decision in *Grimmett v. Brown*, 75 F.3d 506 (9th Cir.), *cert. granted*, 116 S. Ct. 2521 (1996). In

*Grimmett*, the Ninth Circuit affirmed dismissal of the plaintiff's RICO claims under the "injury discovery" accrual rule, holding that the plaintiff's cause of action under RICO arose when she knew or should have known that she had been injured. *Id.* at 512. *Grimmett* does not present the legal question presented here—namely, whether a plaintiff who has *already discovered* the existence and source of his injuries and that the injuries were caused by a pattern of racketeering activity more than four years before filing suit may nonetheless sue for identical injuries within the limitations period flowing from precisely the same pattern of conduct. Rather, the issue in *Grimmett* is merely whether the Ninth Circuit should have employed the same "injury plus pattern" discovery accrual rule *applied by the Eighth Circuit in this case*. *Id.* at 509, 511. The petition for writ of certiorari in *Grimmett* accepted by this Court frames the question presented as follows:

Whether a civil RICO cause of action accrues when the plaintiff knows or should have known she has been injured — even though she does not know that her injury was caused *by the defendants* — or only where she knows or should know that her injury was caused by the defendants and is part of a pattern of racketeering activity.

*Grimmett v. Brown*, No. 95-1723 (U.S.) (Pet. for Writ of Cert. at i). Because the Eighth Circuit applied the more liberal "injury plus pattern" discovery rule in dismissing Petitioners' claims below, this Court's resolution of *Grimmett* will have no effect on the Eighth Circuit's disposition of this case.

Furthermore, in their argument to the Ninth Circuit, the petitioners in *Grimmett* scrupulously avoided arguing for the adoption of the standard urged by Petitioners here—i.e., the last predicate act rule or some variation thereof. See *Grimmett*, 75 F.3d at 511 n.4 (stating that "[plaintiff] does not argue that the panel should adopt the 'last predicate act' rule."). Nor have the



petitioners in *Grimmett* urged such a standard in their submissions to this Court. Ironically, in their brief to this Court, the petitioners in *Grimmett* have cited, with approval, the Eighth Circuit's opinion in this case as promoting a rule that "ensures against the lazy plaintiff" by requiring a plaintiff to use due diligence to discover the pattern element of his RICO claim. *Grimmett v. Brown*, No. 95-1723, 1996 WL 469157, at \*48 n.23 (U.S.) (Brf. for Pet'r).<sup>3</sup>

Because this Court's decision in *Grimmett* will not affect the outcome reached by the Eighth Circuit below, there is no reason for this Court to delay the denial of the petition for writ of certiorari in this case.

### C. The Eighth Circuit's Application of the Equitable Tolling Doctrine Is Not in Conflict with Decisions in Other Circuits.

For well over a century, the doctrine of equitable tolling has consistently been defined by this Court to require a plaintiff injured by fraud to exercise due diligence to avoid the bar of the statute of limitations. *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946); *Wood v. Carpenter*, 101 U.S. 135, 143 (1879); *Bailey v. Glover*, 88 U.S. (21 Wall) 342, 348 (1875). Contrary to this unbroken line of authority, Petitioners here ask this Court to adopt a rule that would reward them for their admitted failure to exercise reasonable diligence in bringing this action, despite having knowledge of their injury, its source and the existence of

<sup>3</sup> The Court's decision of *Grimmett* likewise will have no impact on the "equitable tolling" issues raised by Petitioners in this case. (Pet. at 13.) The Ninth Circuit rejected plaintiff's equitable tolling argument in *Grimmett*, noting that the tolling defense had been waived because the plaintiff never pled the allegedly concealed facts. *Grimmett*, 75 F.3d at 514. In their petition to this Court, petitioners in *Grimmett* concede they "do not seek review of [the equitable tolling] issue because it is fact-bound." *Grimmett v. Brown*, No. 95-1723 (U.S.) (Pet. for Writ of Cert. at 7).

their cause of action. Allowing the petitioners to bring suit more than a decade after they became aware of the facts underlying their claims is antithetical to the salutary purpose of statutes of limitations. "Statutes of limitations ... represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted).

There is no conflict among the circuits as to whether a plaintiff should be excused for failure to exercise reasonable diligence where there has been no concealment of the facts putting the plaintiff on notice of the existence of his cause of action. See e.g., *Grimmett*, 75 F.3d at 514 (the "doctrine of fraudulent concealment is invoked only if the plaintiff both pleads and proves that the defendant actively misled her, and that she had neither actual nor constructive knowledge of the facts constituting her cause of action despite her due diligence") (emphasis in original); *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995) (fraudulent concealment applies only if there is concealment of facts that are the basis of plaintiff's claim and the plaintiff exercises due diligence); *Davis*, 996 F.2d at 624 n.13 (fraudulent concealment may toll the statute of limitations only if the very existence of the cause of action is concealed, and ignorance of the claim is not attributable to plaintiff's lack of diligence). Accord *J. Geils Band Ben. Plan v. Smith Barney, Inc.*, 76 F.3d 1245, 1254 (1st Cir. 1996); *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1328 (8th Cir. 1996); *Chakonas v. City of Chicago*, 42 F.3d 1132, 1135 (7th Cir. 1994); *Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984).

The asserted conflict among the circuits regarding the need for a plaintiff to exercise reasonable diligence to invoke equitable tolling is superficial at best. To the extent *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2nd Cir. 1979) and

*Sperry v. Barggren*, 523 F.2d 708 (7th Cir. 1975) can be read to excuse a plaintiff from the requirement of exercising due diligence, those cases concerned facts where the concealment was "so effective that there was no reason for a diligent plaintiff to have entered into any inquiries as to a possible cause of action." *Hohri v. United States*, 782 F.2d 227, 248 n.54 (D.C. Cir. 1986). Thus, it has been generally recognized that the so-called split among the circuits "may be more apparent than real." *Id.*; *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) (stating that the circuits' split may be "apparent rather than real"); *Campbell v. Upjohn Co.*, 676 F.2d 1122, 1128 (6th Cir. 1982) (circuits' split is "more illusory than real" since the fraudulent concealment in *Sperry* and *Robertson* cases were "such that even reasonably diligent plaintiffs would not have been put on notice"); *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 695 n.16 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981) ("[T]he view that there are two distinct doctrines of tolling perhaps derives from a confusion with earlier versions of the equitable rule requiring plaintiff to prove actual diligence. Such proof was excused if defendant had concealed all cause of reasonable suspicion").

Here, the Eighth Circuit ruled that equitable tolling did not save the Petitioners' claim from the bar of the statute of limitations because Petitioners failed to act with due diligence *despite having knowledge of the facts constituting their cause of action*. (Pet'r App. at A-15 - A-17). The ruling below is consistent with precedent from this Court and other courts of appeals.

In addition, the Eighth Circuit correctly found that Petitioners made no showing that the Respondents affirmatively concealed the existence of the facts establishing the Petitioners' cause of action, and therefore concluded that fraudulent concealment was inapplicable. (*Id.* at A-13, A-15). As correctly noted by the court below, the Respondents did not, and *could*

*not*, prevent the Petitioners from discovering the facts giving rise to their cause of action since the evidence was in the Petitioners' own back yard: Petitioners were aware, directly contrary to the pattern of advertising representations disseminated by the Respondents, that there was mold in their feed, that the health of their dairy animals was failing and that their milk production was poor. (*Id.* at A-13). Although the petition makes no mention of the fact that the court of appeals specifically found that Respondents had done nothing to affirmatively conceal the existence of Petitioners' cause of action, the absence of fraudulent concealment provides a separate basis for the court's conclusion that equitable tolling did not extend the limitations period.

As a creature of equity, the doctrine of equitable tolling necessarily depends upon the unique facts of each case. Based on the particular facts of this case, both courts below correctly determined that equitable relief from the statute of limitations was unwarranted, given the Petitioners' knowledge of the existence of their injury and their cause of action, and their failure to act with diligence despite this knowledge. This issue is inherently fact-bound, and provides no opportunity for this Court to provide guidance to courts or practitioners beyond this case.

### CONCLUSION

This Court lacks jurisdiction to entertain the petition for writ of certiorari because the petition for rehearing was not timely filed in the court of appeals, and this petition for writ of certiorari was filed more than ninety days after judgment was entered below. In the alternative, the petition should be denied because none of the considerations warranting certiorari has been met. The petition is without merit and should be denied.

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### GENERAL DOCKET FOR Eighth Circuit Court of Appeals

Court of Appeals Docket #: 95-1355      Filed: 2/10/95  
Marvin Klehr, et al v. A.O. Smith Corp., et al  
civil - private - none  
Appeal from: U.S. DISTRICT COURT, MINNESOTA

-----  
Lower court information:

District: 0864-3 : CIV 3-94-424  
Trial Judge: Michael J. Davis, U.S. District Judge  
Court Reporter: Karen Grufman, Court Reporter  
Date Filed: 8/27/93  
Date order/judgment: 1/6/95  
Date NOA filed: 2/2/95

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Fee status: paid  
-----

Prior cases:

None

Current cases:

None

A true copy,

ATTEST:      s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

10/30/96

Docket as of October 30, 1996 2:39 pm

Page 1



Proceedings include all events.

95-1355 Marvin Klehr, et al v. A.O. Smith Corp., et al

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Intervenor below

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PRODUCTS, INC., Jointly (See above)  
and Severally

Proceedings include all events.

95-1355 Marvin Klehr, et al v. A.O. Smith Corp., et al

Defendants - Appellees [COR LD NTC ret]  
Frederick W. Morris  
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[COR LD NTC ret]

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MVBA HARVESTORE SYSTEMS  
Movant

Docket as of October 30, 1996 2:39 pm

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Proceedings include all events.

95-1355 Marvin Klehr, et al v. A.O. Smith Corp., et al

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Caption

MARVIN KLEHR; MARY KLEHR;

Plaintiffs - Appellants

WILLIAM G. OLSON

Intervenor

v.

A.O. SMITH CORPORATION;  
A.O. SMITH HARVESTORE PRODUCTS,  
INC., Jointly and Severally

Defendants - Appellees

-----  
MVBA HARVESTORE SYSTEMS

Movant

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95-1355 Marvin Klehr, et al v. A.O. Smith Corp., et al

2/10/95 Civil Case Docketed. (jmb)

2/10/95 CERTIFIED copies notice of appeal, docket entries, order and judgment of 1/6/95. [95-1355] [536436] (jmb)

2/10/95 BRIEFING SCHEDULE: [95-1355] Method of apndx due on 2/21/95 DR aplnt due on 2/21/95 DR aplee due on 3/2/95 Transcript due on 3/22/95 Apndx due on 4/3/95 Aplnt brief due on 4/3/95 Aplee brief due on 5/3/95 reply brief due on 5/17/95 (jmb)

2/13/95 REMARKS: Transcript Ordered. [95-1355] (yml)

2/16/95 APPEARANCE for appellee, attorney Frederick W. Morris [95-1355] [539100] (sek)

2/16/95 APPEARANCE for appellee, attorney Blake Shepard [95-1355] [539101] (sek)

2/17/95 APPEARANCE for appellant, attorney Charles A. Bird [95-1355] [540145] (sek)

2/17/95 APPEARANCE for appellee, attorney David K. Schmitt [95-1355] [540146] (sek)

2/22/95 RECORDS received: Transcript, consisting of one motion summary jdgmt Volume. Location St. Paul. [95-1355] (mgj)

3/30/95 RECORDS received: Appendix filed by Appellants Marvin Klehr consisting of 4 Volume(s), 3 Copies. [95-1355] (yml)

4/3/95 BRIEF FILED - Brief of the Appellants - Marvin Klehr, Mary Klehr. 50 pgs - w/addendum - 10 copies - w/service 3/31/95 [95-1355] [554728] (yml)

4/17/95 MOTION of aplees, for extension of time to file brief until 5/10/95 . [95-1355] [560897] w/service 4/13/95 (skh)

4/18/95 ORDER filed: granting appellee motion extension of time to file brief [560897-1] [560916] Aplee brief now due on 5/10/95 . (skh)

4/25/95 MOTION of aplnt, Marvin Klehr, Mary Klehr, for extension of time to file reply brief until 5/24/95 . [95-1355] [564919], - NO ACTION TAKEN. Date already extended with granting of appellee's motion for ext. w/service 4/24/95 (skh)

5/11/95 RECORDS received: Appendix filed by Appellees A.O. Smith Corp., Appellees A.O. Smith consisting of 1 Volume(s), 3 Copies. [95-1355] (yml)



Proceedings include all events.

95-1355 Marvin Klehr, et al v. A.O. Smith Corp., et al

5/11/95 BRIEF FILED - Brief of Appellee - A.O. Smith Corp., A.O. Smith. 47 pgs - - 10 copies - w/service 5/10/95 . Defects [95-1355] [572480] (yml)

5/19/95 TO SCREENING - to St. Paul. [95-1355] (mel)

5/30/95 BRIEF FILED - Reply brief - Marvin Klehr, Mary Klehr . 25 pgs - 10 copies - w/service 5/26/95 . [95-1355] [576990] (yml)

6/13/95 RETURNED from Screening (20) [95-1355] (mel)

8/24/95 \*SET FOR ARGUMENT\* - October in St. Paul. [95-1355] (dgh)

10/18/95 APPEARANCE for appellant, attorney James Anthony Vick [95-1355] [629794] (rla)

10/18/95 ARGUED AND SUBMITTED IN ST. PAUL TO JUDGES George G. Fagg, Circuit Judge, Gerald W. Heaney, Circuit Judge, David R. Hansen, Circuit Judge. James Anthony Vick for Appellants Mary Klehr. Blake Shepard for Appellees A.O. Smith, by: James Vick. RECORDED. [95-1355] (rla)

11/13/95 28(j) citation received and filed from Appellants Marvin Klehr TO COURT. [95-1355] [640916] (rla)

11/15/95 RESPONSE of aplee, A.O. Smith Corp., A.O. Smith, in opposition to 28(j) citation TO COURT. filed by Marvin Klehr [640916-1] . (rla)

6/6/96 THE COURT: George G. Fagg, Gerald W. Heaney, David R. Hansen. OPINION FILED by David R. Hansen; PUBLISHED. [95-1355] [718195] (mjh)

6/6/96 JUDGMENT: George G. Fagg, Gerald W. Heaney, David R. Hansen  
The judgment of the lower court is AFFIRMED in accordance with the opinion. [95-1355] [718198] (mjh)

6/21/96 RECEIVED UNTIMELY Petition for rehearing by the panel, filed by Appellants Marvin Klehr, Appellants Mary Klehr w/service 6/20/96, TO COURT. [95-1355] (mam)

7/29/96 JUDGE ORDER: denying untimely petition for panel rehearing [724943-1] filed by Marvin Klehr, Mary Klehr [95-1355] [738002] (mam)

8/9/96 MANDATE ISSUED [95-1355] (mam)

8/15/96 RECEIPT for Mandate. [95-1355] [745615] (mam)

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Supreme Court, U.S.  
F I L E D

DEC 4 1996

No. 96-663

CLERK

*In the*  
**Supreme Court of the United States**  
October Term, 1996

MARVIN KLEHR AND MARY KLEHR

*Petitioners,*

v.

A.O. SMITH CORPORATION AND  
A.O. SMITH HARVESTORE PRODUCTS, INC.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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**I. The Purpose And Intent Of RICO Is Compromised By The Eighth Circuit's Rule of Accrual.**

Contrary to the statement of Respondents, no court has held that the Petitioners actually knew that the Harvestore silo was the source of their injuries in the 1970's. Resp. Br. at 11. It is uncontroverted that Petitioners did not subjectively know of the fraud until 1991, when the expert came to their farm. Instead, the Eighth Circuit held that the plaintiffs *should have* discovered their injury and its source. Pet. App. at A-15. It is this critical distinction which Respondents fail to address anywhere in their responsive brief. The Eighth Circuit's rule of accrual penalizes an unknowing plaintiff while permitting a defendant who continues to engage in criminal mail fraud to literally "keep robbing the bank" with impunity once the original statute of limitations has passed. Deceit is more reprehensible than negligence, and should not be rewarded. BMV of North America v. Gore, 64 USLW 4335, 116 S. Ct. 1589, 1599 (1996).

The fact that the damages may be similar to past damages or a continuation of past damages is of no help to Respondents. Petitioners, if they had known of the fraud, would have stopped using the silo earlier and prevented further damages, just as they did in 1991 when they finally learned the truth. A rule that allows damages to continue to accrue indefinitely through *continuous fraudulent acts*, even if the damages are identical or the continuing fraudulent acts which cause them are identical, defeats the purpose and intent of the RICO act.

If this court adopts a rule of accrual similar to the Keystone rule, the result would be different. Here, like Keystone, but unlike Glessner, there were new predicate acts and continuing injury. Keystone Ins. Co. v. Houghton, 863



F.2d 1125 (3rd Cir. 1988); Glessner v. Kenny, 952 F.2d 702 (3d Cir. 1991). Respondents fail to recognize or discuss this important difference in these two cases. Even if a separate accrual rule was established by this court, Petitioners would still have a claim for damages proximately caused by the predicate acts occurring within the statute of limitations.

## **II. Where There Is Continuing Fraud, The Circuit Courts Differ On Application Of The Equitable Tolling Doctrine.**

Once again, Respondents misstate the findings of the Eighth Circuit. That court made no finding that the Petitioners had knowledge of the facts constituting their cause of action. Resp. Br. at 18. Instead, the Eighth Circuit's entire discussion of equitable tolling of the RICO claim is discussed in fn. 11, Pet. App. A-17, where it is stated "the Klehr's failure to act with due diligence precludes application of this doctrine." In other words, the Eighth Circuit never reached an analysis of the scope, magnitude or potential effect of the fraudulent concealment. Upon close, logical analysis, this rule makes the "equitable exception" based on fraudulent concealment meaningless, because the victim is *always* required to exercise the same level of due diligence. The victim's due diligence is *never* measured through the prism of the continuing fraud and its effect on the victim.

Respondents concede that there are differences in the circuits, but claim they are "more illusory than real." Resp. Br. at 18. However, Respondents completely fail to discuss either Riddell v. Riddell Washington Corp., 866 F.2d 1480 (D.C. Cir. 1989), a RICO case previously cited by the Petitioners, or Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), both of which hold that the defendant's conduct in fraudulently concealing the cause of action is analyzed *before* the plaintiff's due diligence is

determined. Moreover, due diligence is not based upon an "inquiry notice" standard, but is instead measured by whether the plaintiff was unaware of facts supporting a crucial element of his claim. See, Hobson, supra, 737 F.2d at 35, and Riddell, supra, 866 F.2d at 1494. The Eighth Circuit's rule of inquiry notice, even in the face of fraudulent concealment (that there "might be a possible fraud"), clearly is in conflict with the rule in the D.C. Circuit and others cited previously.

Finally, Respondents fail to address the merits of the Petitioners' argument, i.e. that the rule on equitable tolling should be different where there is continuing fraud. They have conceded that they continuously mailed numerous pieces of false advertising to the Petitioners and do not contest that a scheme was implemented whereby critical design flaws were actively concealed from the Petitioners and other farmers. In equity, the Petitioner's claims should not be barred until they acquired actual knowledge of the fraud.

## **III. The Order Of July 29, 1996, Is The Final Judgment Of The Eighth Circuit From Which Appeal Lies To This Court.**

This Court has jurisdiction of this appeal because the petition was timely filed. The Circuit Court extended the time for filing by one day. The Respondents' argument fails because they rely on cases that are distinguishable and the basis of the argument is a docket sheet which has no evidentiary value.

Petitioners Marvin Klehr and Mary Klehr prepared and filed a *pro se* petition for rehearing after receipt of the decision of the Eighth Circuit dated June 6, 1996. They mailed the petition on June 20, 1996, and it was received by the clerk on June 21, 1996. Resp. Br., A-9. Although the clerk received the petition on the 15th day following the Eighth Circuit's decision, the court accepted the petition for filing. At no time was notice

given by the court to the parties that the petition was either untimely received or untimely filed. Instead, the Eighth Circuit considered the petition on the merits and, after due consideration, denied it. Pet. App., C-1. The order states as follows:

The petition for rehearing *filed* by the appellants' [sic] *has been considered by the court* and is *denied*. (Emphasis added).

This order is, in all respects, the same order routinely used by the Eighth Circuit in denying any timely filed petition for rehearing. Compare, Harrison v. Dahm, 911 F.2d 37, 38 (8th Cir. 1990), where the court vacated an order denying a petition for rehearing *as untimely filed*. The order in this case does not state that it was not considered because it was untimely. Indeed, it would not take nearly six weeks to deny a petition for rehearing on the basis that it was untimely filed.

In addition to the court's own statement that it "considered" the petition, proof that the petition was considered on the merits lies in the fact that the court did not issue its mandate until August 9, 1996. Resp. App., A-9. The circuit court would have been required by F. R. App. P. 41(a) to issue its mandate by June 27, 1996, if the opinion of June 6, 1996 had been the final judgment of the court. The mandate of the court *must* issue 7 days after the expiration of the time for filing a petition for rehearing. *Ibid*. Only the "*timely*" filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court." (Emphasis added). See also F.R. App. P. 26(b)(the circuit court can, on its own motion, extend the time for filing a petition for rehearing). Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427 (2d Cir. 1970) (cert. den. 400 U.S. 829) (court of appeals has power to enlarge time to modify petition for rehearing although the

time for rehearing may have expired). Because the mandate was not issued until August 9, 1996, it is clear that the court of appeals extended the time for filing the petition for rehearing, that it was considered on the merits and that the court considered its order of July 29, 1996 to be the final judgment of the court. F.R. App. P. 41(a). See, Missouri v. Jenkins, 495 U.S. 33, 48, fn. 17 (1990) (discussing rule 41(a)).

Respondents rely upon the docket text. While the docket text establishes the date the petition was *received*, it has no further evidentiary value as to whether the petition was *timely filed*. The docket text itself does not state that the petition was untimely filed, nor does it state that the petition was denied because it was untimely filed. The unknown clerk who wrote the text has no authority to make or interpret orders from the Eighth Circuit. For purposes of maintaining the docket and its form, the clerk is under direction and control of the Director of the Administrative Office of the United States Courts, and not the judges who considered the petition for rehearing. F. R. Civ. App. 45(b). In spite of this, the carefully chosen words used are "untimely received," and not "untimely filed."

The Eighth Circuit's authority to accept the *pro se* petition for filing and to consider it on the merits, is in accord with prior decisions of this court. In Bowman v. Loperena, 311 U.S. 262, 266 (1940), the court stated:

The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until



such denial, and the time for appeal runs from the date thereof.

The cases cited by Respondents are not applicable on their facts. In Allegrucci v. U.S., 372 U.S. 954 (1963) the petition for rehearing was filed *after* the petition for certiorari was filed and expressly for the purpose of curing the timeliness defect. See, discussion of this case in Stern et al., Supreme Court Practice, 7th Ed., p. 279. This is impermissible, (Missouri v. Jenkins, *supra*, at 439), but it is not what happened in this case.

In Dept. of Banking v. Pink, 317 U.S. 264, 266 (1942), the New York Court of Appeals issued judgment and a motion to amend the remittitur was later filed to have the court "declare what had in fact occurred upon its previous decision of the case." This Court said the motion to amend the remittitur did not have the effect of extending time because it "did not seek to have the Court of Appeals reconsider any question decided in the case"—unlike a petition for reargument or rehearing. In this case, there has been a timely petition for rehearing involving the merits of the dispute.

Missouri v. Jenkins, *supra*, dealt with the issue of whether a petition for rehearing en banc was to be treated as a petition for rehearing for purposes of tolling the 90 day period to file a petition for certiorari. The case merely restated the general rule that the 90 day time limit is mandatory, and that the time can be tolled through filing a petition for rehearing. There was no discussion of the issue presented here.

Federal Trade Comm. v. Minneapolis Honeywell Regulator Co., 344 U.S. 206, 211-13 (1952), involved a situation where there was no petition for rehearing, and the FTC filed a memorandum with the circuit court relating to parts I and II of a cease and desist order, but not requesting alteration or modification of part III. The circuit court issued a "final decree"

but made no change in substance to its previous ruling. The FTC sought to appeal from part III of the order, more than 90 days after the original ruling, but within 90 days of the "final decree". This court rejected the petition because the FTC "memorandum" was not a petition for rehearing requesting a change in substance of part III of the original order. The original decision of the circuit court stood as the final judgment from which appeal would be taken to this Court.

Of note is the fact that this Court, in FTC v. Minneapolis Honeywell, *supra*, recognized the existence of the rule Petitioners seek to invoke in this case. "Petitioner refers us to cases which have held that when a court considers on its merits an untimely petition for a rehearing, or an untimely motion to amend matters of substance in a judgment, the time for appeal may begin to run anew from the date on which the court disposed of the untimely application." 344 U.S. at 210 (citing Loperena, *supra* and other cases.)

The purpose of the rule extending the time to appeal when a petition for rehearing is filed is to make sure that this Court is reviewing the *final* judgment of the circuit court. As stated in Department of Banking v. Pink, 317 U.S. 264, 268 (1942):

For the purpose of the finality which is prerequisite to a review in this court, the test is...whether the record shows that the order of the appellant court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a...court...the object of the statute is to limit the applicant's time to three months from the date when the *finality* of the judgment for purposes of review is established. (Emphasis added).



In this case, the denial of the petition on July 29, 1996, stands as the final judgment of the Eighth Circuit from which appeal lies to this court. Accordingly, because this petition for certiorari was filed within 90 days of July 29, 1996, it is timely.

This court has jurisdiction to hear this appeal.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.  
F I L E D  
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No. 96-663

In the  
**Supreme Court of the United States**  
October Term, 1996

MARVIN KLEHR AND MARY KLEHR

*Petitioners,*

v.

A.O. SMITH CORPORATION AND  
A.O. SMITH HARVESTORE PRODUCTS, INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX – VOLUME I

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Petition for Certiorari filed October 24, 1996  
Certiorari granted January 10, 1997

192pp

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**U.S. DISTRICT COURT  
DISTRICT OF MINNESOTA (ST. PAUL)**

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**CIVIL DOCKET FOR CASE #: 94-CV-424**

**Klehr, et al v. A.O. Smith Corp, et al**  
**Assigned to: Judge Michael J. Davis**  
**Referred to: Magistrate Judge Franklin L. Noel**  
**Filed: 08/27/93**  
**Jury demand: Both**  
**Nature of Suit: 470**  
**Jurisdiction: Federal Question**  
**Demand: \$0,000**  
**Lead Docket: None**  
**Docket # in other court: None**  
**Cause: 18:1962 Racketeering (RICO) Act**

---

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**Docket as of February 15, 1995 1:48 pm**

Proceedings include all events.  
94-CV-424

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Docket as of February 15, 1995 1:48 pm

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94-CV-424

MARY KLEHR  
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Charles Anthony Bird  
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Docket as of February 15, 1995 1:48 pm

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94-CV-424

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Docket as of February 15, 1995 1:48 pm

Proceedings include all events.  
94-CV-424

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and Severally**  
defendant

**Blake Shepard, Jr**  
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**Frederick William Morris**  
(See above)  
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6/6/94	129	AFFIDAVIT and EXHIBITS of Charles A. Bird regarding motion for summary judgment. [120-1] [85-1] 8+ pages (--separate- two expandables) (ps)
6/10/94	146	REPLY MEMORANDUM by A O Smith Harvestore in support of motion for summary judgment. [85-1] 10 pages (ps)
6/10/94	147	AFFIDAVIT and EXHIBITS of Blake Shephard, Jr. (16 pages) (ps)

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7/1/94	159	LETTER/BRIEF by plaintiffs in opposition to motions for summary judgment. [120-1] [85-1] (ps)
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1/6/95	213	JUDGMENT entered (1 pg) (dl) [Entry date 01/09/95]

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1/27/95 222 TRANSCRIPT of motion held 6/15/94  
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2/2/95 223 NOTICE OF APPEAL by pltfs from  
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[Entry date 02/03/95]

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Docket as of February 15, 1995 1:48 pm

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Case No.: 4-93-822 (JMR)  
Jury trial demanded

Marvin Klehr and  
Mary Klehr,

Plaintiffs,

v.

A.O. Smith Corporation and  
A.O. Smith Harvestore Products,  
Inc., Jointly and Severally,

Defendants.

AMENDED COMPLAINT

---

Plaintiffs, Marvin and Mary Klehr, by and through their  
attorneys, as noted below, state the following as their claims  
in this matter:

1. Plaintiffs are adult residents of Scott County,  
Minnesota, and were dairy farmers in such county at all times  
relevant to this matter.

2. Defendant A.O. Smith Corporation ("AOS") is a  
Delaware Corporation whose principal place of business is in

Milwaukee, Wisconsin and doing business in the various states and the State of Minnesota and engaged in the business of designing, manufacturing, marketing and sales of various items of farm machinery and equipment, as well as other products, including, but not limited to, automobile frames and water heaters. AOS, in the late 1940's, researched, designed, patented, manufactured and marketed the Harvestore feed storage structure, and continued to do so exclusively until June, 1961, and in concert and combination with A.O. Smith Harvestore Products, Inc. thereafter.

3. Defendant A.O. Smith Harvestore Products, Inc. ("AOSHPT") is a Delaware Corporation, incorporated in June 1961 by AOS, whose principal place of business is in the State of Illinois doing business in various states and doing business in the State of Minnesota and is engaged in the business of designing, manufacturing, marketing and sales of various items of farm feed storage structures and related equipment, as well as other products, including, but not limited to Harvestore feed storage structures, slurry storage structures, feed conveyers, and water storage structures. AOSHPI is a wholly owned subsidiary of AOS.

4. Minnesota Valley Breeders Association ("MVBA") is a Minnesota Company doing business in the State of Minnesota and has been engaged in the business of selling, distributing, installing, assembling, servicing, repairing and modifying farm equipment and machinery and structures in its capacity as agent and representative for AOS and AOSHPI, as well as other products, including, but not limited to, semen for breeding cattle and livestock. MVBA was a member of Defendant's "Dealer Organization", comprised of exclusive dealers for retail sale of Defendants' farm products

and equipment. The Dealer Organization was created by Defendants. Dealer management, salesmen, and servicemen were required to attend education and training seminars scheduled by and conducted by Defendants. The Dealer Organization had a voice in sales of Harvestore silos through the "Dealer Advisory Board" and "Dealer Council".

### JURISDICTION

5. The amount in controversy in this action exceeds \$50,000.00 exclusive of interest and costs.

6. Jurisdiction of this action is grounded upon title 28 U.S.C. 1331, 28 U.S.C. 1332, and 18 U.S.C. 1961 et seq.

### GENERAL ALLEGATIONS

7. From 1949 to the present, AOS and AOSHPI have sold more than 75,000 Harvestore feed storage structures, thousands of which were sold after October 15, 1970.

8. In approximately July, 1973, Plaintiffs were contacted by a salesman of MVBA, Richard Deutsch, about purchasing a Harvestore feed storage structure ("Harvestore Structure" or "Harvestore Silo") and unloader that could be used to store medium moisture forage.

9. The Harvestore structure as described by the salesman was a 25 foot x 80 foot storage unit that the salesman recommended be used to store medium moisture alfalfa silage, which the salesman referred to as "haylage", a term coined by AOS.

[Paragraphs 10-11 included at G 1-12 in Pet. for Writ of Cert.]

12. These oral representations of Richard Deutsch as outlined in paragraph 11 were the same representations as contained in the Harvestore structure sales literature and films bearing the AOSHPI and AOS name and/or symbol as outlined in paragraph 10.

13. In justifiable reliance upon these material representations Plaintiffs purchased the Harvestore structure from MVBA on or about July 15, 1974. The purchase order was transmitted by MVBA to AOSHPI through the United States mail on or about this same date. AOSHPI, in turn, sent information about the sale, by U.S. Mail, to AOS, which maintained all warranty files and administered all claims regarding Harvestore silos.

14. In or about the spring of 1975, the Plaintiffs, for the first time, placed alfalfa into the Harvestore structure.

[Paragraphs 15-16 included at G 14-30 in Pet. for Writ of Cert.]

17. The material representations made in the sales literature, brochures, and films after the sale included that the Harvestore structure was oxygen limiting and would prevent oxygen from coming in contact with the feed and the spoilage resulting from exposure to oxygen, that the Harvestore structure stored feed like a fruit jar, the unloader door was designed to exclude air, and the structure was designed and was backed by AOS and its Research and Development Department. These material misrepresentations, after the sale,

including the representations and material omissions set out at Paragraphs 15, 16, and 26, fraudulently concealed from Plaintiffs any claim or cause of action based upon false statements made before the sale.

18. These material representations were the same as representations (a) contained in the Harvestore structure sales literature bearing the AOSHPI and AOS name and/or symbol and (b) the representations contained in the "Harvestore Farmer" magazine and "Harvestore System Farming" magazine the Plaintiffs received through the mail between 1972 and 1991, including the representation that the Harvestore structure would prevent oxygen from contacting the feed.

19. These material representations made before and after the sale were false.

20. Based on the material misrepresentations made, and upon which the Plaintiffs justifiably relied, the Plaintiffs believed they were dealing with a single company, AOS, which was backing the Dealer Organization in general, MVBA in particular, and the product.

21. Plaintiffs relied on the misrepresentations to their detriment after the sale in operating, using, and repairing the Harvestore structure from 1974 to 1991, and continued to suffer damages as a result.

22. In the years after commencing use of the Harvestore structure on Plaintiffs farm, the Plaintiffs dairy herd began to experience certain problems which were caused by the 25 x 80 Harvestore silo, including:



- (a) Erratic milk production, with a decline in milk production in relation to other dairy farmers.
- (b) Problems with herd health, reproduction, and body condition.

23. Plaintiffs made diligent efforts to discover the origin of the problems being experienced by their herd over the years, including, but not limited to the following:

- (a) Modifying the feed rations.
- (b) Periodic testing of the feed.
- (c) Changing feed companies.
- (d) Milking their herd more frequently.
- (e) Changing milking equipment.
- (f) Seeking advice from veterinarians and feed salesman and other experts.

24. Plaintiffs also advised MVBA of the problems being experienced by their herd.

25. AOS, AOSHPI, and MVBA both directly and indirectly, through literature and films advised Plaintiffs that any problem with feed in their Harvestore structure was related to their own management or a repairable problem with the silo. See paragraphs 10(a)(8), 15(a), 15(q), 16(a), 16(c), 16(d), 16(f), and 16(h) above.

[Paragraph 26 included at G 30-35 in Pet. for Writ of Cert.]

27. That such conduct and misrepresentations of Defendants as alleged herein was willful, malicious, and with a reckless disregard to the rights or safety of the Plaintiffs.

28. At all times relevant to this matter AOSHPI and AOS, separately and in concert, failed to advise and fraudulently concealed from the Plaintiffs and other farmers similarly situated that the problems that they were experiencing were related to the failure of the Harvestore structure to operate as an "oxygen limiting" feed storage structure, including those items specified at paragraph 26 herein.

29. That the Plaintiffs continued their attempts to solve their problems up until the spring of 1991 and neither suspected nor knew that the Harvestore structure was the cause of substantial and significant damage to their dairy herd and their farm.

30. In the spring of 1991, Plaintiffs read in the newspaper about potential defects in Harvestore silos, and subsequently began investigating the Harvestore structure as a cause of their herd problems and stopped using the Harvestore Silo at that time.

31. In the months and years after Plaintiffs stopped using the 25 x 80 Harvestore silo, Plaintiffs milk production increased dramatically and they became convinced that the Harvestore structure was responsible for their dairy herd problems. As a direct and proximate result of the Defendants' conduct, and by the use of the Harvestore silo on their farm,

Plaintiffs have suffered direct and consequential damages, including, but not limited to, loss of milk production, capital loss, Harvestore silo loss, and cow and calf losses in a sum not less than \$50,000.00.

**COUNT 1**  
**FRAUD - AOSHPI**

32. Plaintiffs incorporate by reference paragraphs 1 through 31.

33. During all times relevant to this matter MVBA salesmen were express, implied, representatives and agents of AOSHPI.

34. At all times relevant to this matter, MVBA was held out to the public and to the Plaintiffs as authorized representative and agent of AOSHPI.

35. During all times relevant to this matter, AOSHPI provided training to MVBA salesmen, including Richard Deutsch, regarding the sale of Harvestore structures.

36. This training included specifying to the salesmen, including Richard Deutsch, the representations that should be made to the prospective customers, including Plaintiffs, regarding the "oxygen limiting" features of the Harvestore structure.

37. The representations made by MVBA to the Plaintiffs regarding the Harvestore structure before the sale were the same representations AOSHPI instructed MVBA

salesmen to make to prospective purchasers, and included those representations set out at paragraphs 10 and 11 herein.

38. AOSHPI furnished to MVBA salesmen, including Richard Deutsch, sales literature regarding the Harvestore structure, which included, but was not limited to the materials identified in paragraphs 10, 11, 15, 16, 17, and 18. AOSHPI also directly furnished information to the Plaintiffs in the Harvestore Farmer magazine, Harvestore System Farming magazine, Hoard's Dairyman magazine, and other direct mailings, including the materials identified in paragraphs 10, 11, 15, 16.

39. AOSHPI instructed the Dealer Organization, MVBA, and MVBA salesmen to distribute the Harvestore structure sales literature to prospective purchasers.

40. Some of the Harvestore structure sales literature furnished by AOSHPI to MVBA was in fact, presented to the Plaintiffs, including the sales literature specified in paragraphs 10, 11, 15, 16, 17, and 18.

41. That Plaintiffs, as farmers, were a part of the class of persons that AOSHPI intended to influence by such literature, films, and promotional materials.

42. Representations made by AOSHPI to Plaintiffs in this sales literature both directly and through MVBA regarding the Harvestore structure and how it operates, including the representations at paragraphs 10, 11, 15, 16, 17, and 18 herein were material to Plaintiffs decision to purchase the Harvestore structure, as well as the continued use,



operation, maintenance, and repair of such structure after the sale, continuing to March 1991.

43. That these written, visual, and oral representations referred to in part in paragraphs 10, 11, 15, 16, 17, 18, 37, 38, 40, and 42 were false. In addition, AOSHPI failed to inform the Plaintiffs of material information which should have been given in light of the affirmative representations made, including but not limited to, that information outlined at paragraphs 26 and 28.

44. Through its conduct, AOSHPI assisted, instigated and participated in the false representations made by MVBA to the Plaintiffs, as well as fraudulently concealing the material omissions set out heretofore from the Dealer Organization, MVBA, and the Plaintiffs.

45. AOSHPI knew the representations it was making to the Plaintiffs directly, in advertising, and promotional material and through MVBA were false or were made recklessly, without any knowledge of the truth of those representations.

46. AOSHPI made those representations as part of their overall marketing program and expected and intended that Plaintiffs and others similarly situated would rely, and the Plaintiffs did rely upon these representations.

47. Unaware of the falsity of these representations, Plaintiffs justifiably relied upon the same to their detriment, in purchasing the silo, and in continuing to use it on their farm to store feed from which their livestock were fed until Spring 1991.

48. As a direct and proximate result of AOSHPI's misrepresentations, Plaintiffs have suffered severe, direct and consequential economic and non-economic damages, including those damages listed at paragraph 31.

49. AOSHPI's conduct was voluntary, intentional, malicious and so willful and wanton as to demonstrate a reckless disregard of Plaintiffs rights and safety.

## COUNT II FRAUD - AOS

50. Plaintiffs incorporate by reference paragraphs 1 through 49 herein.

51. During all times relevant to this matter, MVBA was held out to the public as an authorized representative of AOS.

52. During all times relevant to this matter AOS was directly involved in the research and development, marketing, financing, warranty programs, and distribution of replacement parts and advertising concerning the Harvestore structures such as the one purchased by the Plaintiffs.

53. During all times relevant to this matter, AOS was directly involved in approving the content of and distribution of Harvestore structure sales training materials, sales literature, films, and promotional material utilized by AOSHPI through its authorized dealers, including the sales literature, films, magazines, and promotional material furnished to Plaintiffs herein, including the material set out at paragraphs 10, 11, 15, 16, 17, and 18 herein.



54. The representations contained in the sales training materials, sales literature, films, magazines, and promotional material approved by AOS regarding the Harvestore structure and how it operated, including the representations at paragraphs 10, 11, 15, 16, 17, and 18 herein, were material to Plaintiffs decision to purchase the Harvestore structure, as well as the continued use, operation, maintenance, and repair of such structure, continuing until 1991.

55. That the representations made to the Plaintiffs, and referred to in the preceding paragraph were false. In addition, AOS failed to inform the Plaintiffs of material information which should have been given in light of the affirmative representations made, including but not limited to, that information outlined at paragraphs 26 and 28.

56. Through its conduct, AOS instigated, assisted, and participated in the false representations referred to herein and made by MVBA to the Plaintiffs, as well as fraudulently concealing the material omissions set out heretofore from the Dealer Organization, MVBA, and the Plaintiffs.

57. AOS knew the representations it was making to Plaintiffs through AOSHPI and MVBA were false or were being made recklessly, without knowledge of the truth or falsity of these representations.

58. AOS made these representations to Plaintiffs through AOSHPI and MVBA as part of their overall marketing program, and intended that Plaintiffs and others similarly situated rely on these material misrepresentations.

59. Unaware of the falsity, the Plaintiffs did, in fact, rely upon these representations to their detriment, in purchasing the silo, and in continuing to use it on their farm to store feed from which their livestock were fed until Spring 1991.

60. As a direct and proximate result of AOS's representations, Plaintiffs have suffered severe, direct and consequential economic and non-economic damages, including those damages listed at paragraph 31.

61. AOS's conduct was voluntary, malicious, and willful and wanton so as to demonstrate a reckless disregard of Plaintiffs' rights and safety.

### COUNT III RICO 1962(c) - AOS AND AOSHPI

62. Plaintiffs incorporate by reference 1 through 61.

63. In connection with the representations made by AOSHPI to Plaintiffs and prior to and after the sale of the Harvestore structure to Plaintiffs, MVBA, AOSHPI and AOS used the mails or caused the mails to be used on at least 25 occasions between June 1973 and March 1991 to transmit:

(a) Purchase orders for Harvestore structures from MVBA and other authorized dealerships to AOS and AOSHPI. In particular, on or about July 15, 1974, an "AOSHPI copy" of Plaintiffs purchase order for the 25 x 80 Harvestore silo was transmitted by U.S. Mail from MVBA to AOSHPI. This was one copy of a multi-copy form which used carbon paper to create additional copies. These purchase

order forms were standardized and approved by Defendants for use by the dealers. A copy of every purchase order for every silo sold by a Harvestore dealer was transmitted to AOSHPI and/or A.O. Smith by U.S. Mail, and/or by wire transfer of information (facsimile) in interstate commerce. AOSHPI would, in turn, confirm the order by return U.S. Mail and/or by wire transfer of information (facsimile). See Dealer Management Guide 710. AOSHPI then would provide, by mail, information to AOS on the sale for purposes of creating a warranty file, which was maintained and administered by AOS.

(b) Sales literature and sales aides between AOSHPI and MVBA and between AOSHPI and its other authorized Harvestore structure dealers, including the items listed at paragraphs 10, 11, 15, 16 and 63(f). See also Monthly Ad-itude, mailed to the Dealer Organization, including MVBA, periodically, beginning January 1974.

(c) Sales literature and/or sales aides between AOS and authorized Harvestore structure dealers, including the items listed at paragraphs 10, 11, 15, 16, and 63(t).

(d) Sales literature between AOS and AOSHPI, and between Defendants and advertising agencies and film production companies, including the items listed at paragraphs 10, 11, 15, 16, 63(f), and 63(h).

(e) Coupons requesting AOSHPI sales materials between farmers throughout the country and both AOS and AOSHPI, including the coupons listed at paragraphs 10, 11, 15, 16, 63(f), and 63(h).

(f) Sales literature between both AOS and AOSHPI and farmers throughout the country. In particular, the "Harvestore Farmer" and "Harvestore System Farming" magazine contained numerous solicitations for use of the U.S. Mails in regards to advertising materials concerning Harvestore silos. These magazines were sent to thousands of farmers through the use of AOSHPI's "electronic mailing list" on the dates indicated below. (See AOSHPI Dealer Management Guide 430.1 and 440.1). Defendants received coupons through the mail from farmers in response to these ads. Defendants sent to farmers advertising materials which contained false representations in the furtherance of the fraud, which included the following:

(1) Those Harvestore Farmer and Harvestore System Farming ads already set out at paragraphs 10, 11, 15 and 16 herein;

(2) Volume 4, number 2, (March-April, 1965) at page 4, appears a mail-in coupon for the book "Courage to Change". This book contains false statements at pages 59-60 regarding the breather valve (only operates in extreme conditions) and that the breather system provides oxygen free sealed storage.

(3) Volume 8, number 4 (Fall 1969) at page 15. The breather bags are depicted but no breather valve is shown and it is falsely stated that the pressure equalizing process practically eliminates oxygen contact with stored feed. At page 17 is a picture of a 25 x 80 Harvestore silo. A depiction of breather bags and no breather valve is shown. The advertisement states that the system compensates for gas pressure changes inside the structure by "breathing" air in and



out of the bags. It states that Harvestore silos are oxygen limiting.

(4) Volume 8, number 5 (Fall Special 1969) at page 16. Explaining the 25 x 80 Harvestore silo and making the same representations as in the immediately preceding subparagraph.

(5) Volume 9, number 2, (Winter Special, 1972) pages 22-23. There is a depiction of a 25 x 80 Harvestore silo and also the breather bags suspended from the Harvestore silo making the same representations as in the immediately preceding subparagraph.

(6) Volume 11, number 5 (September-October, 1972) at an advertising supplement on page 13 is a postage pre-paid post card addressed to AOSHPI to obtain information from the local dealer regarding Harvestore silos.

(7) Volume 11, number 6 (November-December, 1972) at page 1 is a postage paid mail card for the 1973 Buyer's Guide containing false information as referred to hereinabove at paragraph 10(a)(2).

(8) An article in Volume 12, (May-June, 1973) number 3, page 11, suggesting that the mails and telephones be used to obtain films from the Venard Film Library including the "Magic of the Harvestore Storage" referred to above at paragraph 10(b)(3). The mails and telephones were, in fact, used hundreds of times from 1970 to 1993, to arrange for use of Defendants' films regarding Harvestore silos by colleges, universities, schools, television stations and others, through the Venard Film Library.

(9) Volume 12, number 3 (May-June, 1973) at page 27, a mail in coupon for the brochure "You Can't Beat The System" referred to herein at paragraph 10(a)(10).

(10) Volume 13, number 1 (January-February, 1974) on back appears a solicitation for obtaining advertising information through the mails.

(11) Volume 13, number 2 (March-April, 1974) at page 27 are mail coupons for the purpose of expanding the mailing list of the "Harvestore Farmer" magazine and promising to send a free coffee mug by return mail. The "Harvestore Farmer" magazine was mailed to those farmers whose names were sent in and contains false statements as particularized in this paragraph and also at paragraphs 10(a) and 10(c). At pages 19 and 32 of this same issue are additional mail-in coupons. At page 6 of this issue is an article announcing a salesman training center. The mails were used for salesman in that the sessions were arranged by mail and training materials were sent by mail to the salesman before the training session.

(12) Volume 13, number 3 (May-June, 1974) at page 19. A mail-in coupon for information on Harvestore silos. At page 21 is a coupon for a "High Moisture Grain" brochure.

(13) Volume 13, number 4 (July-August, 1974) on the back cover solicits mail request for a "High Moisture Grain" brochure.

(14) Volume 14, number 1 (Spring, 1975) at pages 16-17 the reader is requested to "circle number 3" on a postage



paid return card for advertising information. At page 2 is a request to "circle number 1" on the postage paid return card.

(15) Volume 14, number 2 (Buyer's Guide Issue, 1975) between pages 16 and 17 are requests to "circle number 3" on the postage paid return card. (See Paragraph 15(a).

(16) Volume 14, number 3 (Summer, 1975) at page 16 is an ad referring to "Oxygen Limiting" Harvestore storage and requesting the reader "circle number 1" on the postage paid return card. The next 2 pages solicit "circle number 3" on the same return card.

(17) Volume 14, number 4 (Fall, 1975) has a mail coupon for information on Harvestore silos. After page 15 is a mail coupon for the 1975 Buyers Guide which contains false statements as noted at Paragraph 15(a). Also before page 17 is an invitation to "circle number 3" on the postage paid return card.

(18) Volume 14, number 5 (Winter, 1975) has a mail in coupon for information on Harvestore silos.

(19) Volume 15, number 1 (January, 1976) has mail-in coupons on pages 2 and before page 18. It also has 2 requests, after page 16, to "circle number 3" on the postage paid return card.

(20) Volume 15, number 2 (March, 1976) has a mail in coupon for Harvestore silos, including the haylage booklet. (See Paragraph 16(f).) Also there are two requests, after page 16, to "circle number 3" on the postage paid return card.

(21) Volume 15, number 3 (June, 1976) has request after page 12, to "circle number 3" on the postage paid return card. (See Paragraph 15(b).)

(22) Volume 15, number 4 (September, 1976) has a mail coupon on pages 2, 7, 11, for information on Harvestore silos.

(23) Volume 15, number 5 (November, 1976) has a coupon at page 2 for more information on Harvestore silos. After page 16 are two requests to "circle number 3" on the postage paid return card for more information. At page 6, it states falsely that bottom unloading helps prevent oxygen from coming into contact with the feed. It also states that livestock receive warm feed even in the coldest weather without stating that the reason for warm feed is continued respiration/fermentation of the crop due to oxygen exposure through the unloader door and breather valve. At page 7 it states that A.O. Smith engineers were challenged with designing a method of unloading that did not allow the structure to fill with oxygen and that "bottom unloading" was the best solution to the problem. This is false in that bottom unloading is a major design problem allowing for the free access of air to the dome space.

(24) Volume 16, number 1, (February, 1977) after page 16 is a request to "circle number 3" on the attached postage paid return card in order to get more information from AOSHPI and/or the dealer.

(25) Volume 16, number 2, (April, 1977) after page 16 is a request to "circle number 3" on the attached postage paid

return card in order to get additional advertising information from AOSHPI and/or the dealer.

(26) Volume 16, number 5, (December 1977) after page 16 has a request to "circle number 3" on the attached postage paid return card in order to obtain further information relative to Harvestore silos. There is another coupon on the next page with the title "Yes, You Can" and request to mail the coupon to AOSHPI in order to get a free book. On the next page is a coupon which states "Yes, mail me information on the complete line of Harvestore system automation." This coupon is to be mailed to AOSHPI.

(27) Volume 17, number 2, (April 1978) has the quote "Yes, You Can" coupon referred to in the immediately preceding subparagraph. It also has, after page 16, a request to "circle number 3" on the attached postage paid return card, and also the coupon referred to in the immediately preceding subparagraph with the request "Yes, mail me information on the complete line of the Harvestore system automation."

(28) Volume 17, number 3, (June, 1978) on page 2 is a coupon to be mailed to AOSHPI requesting that additional information about Harvestore storage systems be returned by mail. At page 9, is another coupon to be mailed to AOSHPI stating "Yes, I am ready. Send me my free book." After page 16, is the request to "circle number 3" on the attached postage paid return card to obtain further information from AOSHPI regarding Harvestore silos.

(29) Pages 876 and 877 of the July 25, 1978 issue has an advertisement entitled "Break Out". This ad states that feed stored within a Harvestore corn unit is of higher quality

than other storage methods. It fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(30) Pages 1244 and 145 of the October 25, 1978 issue had an advertisement entitled "Cut Costs". This ad implies that the use of a Harvestore structure will result in higher net profits by increased production and reduction in money spent on money supplements. Fails to warn potential customers of inherent risks in using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(31) Volume 17, number 4 (October 1978) at page 14 it states that in conventional silos air can enter the structure and oxygen is the great enemy of moist feeds. It goes on to state that a Harvestore structure solves this problem through its combination of oxygen limiting construction, glass coating and bottom unloading. At page 15, there is a depiction of the breather bags with the sun and the moon without any depiction of a pressure relief valve. It states that the Harvestore structure breathes compensating for changes in air pressure while protecting feed from oxygen. It discusses A.O. Smith engineers designing the patented breather bag that has been a standard feature in every Harvestore since 1949. It goes on to state that the breather bag system allows the Harvestore structure to breathe without allowing air to come into contact with the feed. It states that the constant in and out breathing action compensates for normal fluctuations in atmospheric pressure. It does not allow fresh air to come into contact with stored feed. It states that excessive heating is prevented by the structures oxygen limiting environment. At



page 16, it states that the reason for warm feed in a Harvestore is the dark blue color of the structure and that the forage and grain comes out warm and appealing--far more palatable to livestock than the frozen popsicles that so often comes from conventional silos. It discusses oxygen limiting storage through the use of marine type access hatches that are "dogged down" to prevent air from entering. The "view point" at page 3 of this issue discusses the devotion to product improvement that is found in the history of A.O. Smith Corporation.

(32) Volume 17, number 4 (October 1978) has a coupon at page 2 requesting "Send me additional information about Harvestore storage systems and feeding equipment." It has a coupon at page 9 entitled "Yes, you can" and stating that "Yes, I am ready. Send my free book." At page 15, is an article that discusses A.O. Smith engineers. It states that breather bags provide a simple but effective system that allows the Harvestore structure to "breathe" without allowing air to come into contact with the feed. It goes on to state that the constant in and out breathing action of the breather bags compensates for normal fluctuations in atmospheric pressure, and yet it does not allow fresh air to come into contact with stored feed. It has a depiction of the top of a Harvestore silo with the sun and the moon and the caption for the picture which says "breather bags allow the Harvestore structure to "breathe", compensating for changes in air pressure while protecting feed from oxygen." The diagram does not have a depiction of the breather valve. At page 16, it states that the dark blue color of Harvestore causes forage and grain to come out warm and appealing--far more palatable to livestock than the frozen popsicles that so often come from conventional silos. This is false in that the significant reason for warm and

hot feed in a Harvestore silo, as known by the Defendants, is continued access of oxygen to the feed and continued fermentation and oxidation of the crop stored inside.

(33) Volume 17, number 5 has a mail in offer "Yes, You Can" at page 9. This contains the statement "Yes, I am ready. Send my free book." This same coupon appears between pages 16 and 17.

(34) Volume 18, number 4 (October 1979) has a mail in coupon on page 9 to obtain additional information about Harvestore storage systems and also has a toll free number 800-528-6050 ext. 656 in order to get additional information.

(35) Volume 18, number 5 at page 25 has the same coupon referred to in the immediately preceding subparagraph.

(36) Volume 19, number 2 (May 1980) at page 10 has a coupon for a book entitled "The Winning System". This book costs \$12.50 and is ordered by U.S. Mail through A.O. Smith Products Service Division, a division of A.O. Smith Corporation. The book is then sent back to the purchaser by U.S. Mail. The book contains misrepresentations relative to Harvestore silos. At pages 5-6 the book states that the Harvestore silo accommodates changes in pressure without allowing outside air to come into contact with the feed. There is a depiction of the top of a Harvestore silo on page 6 of the book which states the same thing but does not show air going in or out the pressure relief valve or through the unloader door. The book defines oxygen limiting at page 267, as "a feed storage system in which ensiled feeds are protected from the access of oxygen." At page 15 of the book it states that



the "real key to the Harvestore structure is the ability to limit oxygen is its patented breather bag system." It goes on to state "the purpose of the breather bags is to allow air to enter and exit the structure as it must compensate for changes in pressure--but without allowing it to come into contact with stored feeds." The breather system is defined at page 262 of the book, as "the system of valves, hoses, and breather bags that allows a Harvestore structure to compensate for changes in atmospheric pressure without allowing oxygen to come in contact with stored feeds." These representations are false. At Pages 252-254 of the book is a description of the Harvestore Dealer Organization. At Pages 244-247 of the book is a description of the Harvestore dealer salesman, the Harvestore Farmer magazine and films and literature that are "widely distributed to reach the greatest possible audience." This book was approved by AOS for content and was distributed and sold by AOS. There is a coupon on page 16 of the magazine to obtain a brochure "High Moisture Grains" which contains false statements about oxygen limiting Harvestore silos. On the back cover where there is a depiction of the Harvestore silo showing the air going in and out of the breather bags but not showing air coming in through the unloader or the pressure relief valve. It also states, falsely, that the unloader door is designed to exclude air.

(37) Volume 19, number 3 (July 1980) has a depiction of the top of the Harvestore silo showing air going in and out of the breather bags but not showing the pressure relief valve. The ad goes on to state that "breather bags allow the structure to compensate for daily temperature changes. As outside temperatures fall, the head space gases inside cool and contract, causing the air to enter the bags but not allowing the feed deteriorating oxygen to come into contact with the feed."

The ad also has a mail in coupon to obtain a brochure entitled "High Moisture Grains" which, on the back cover, has false representations concerning the oxygen limiting characteristics of the Harvestore silo.

(38) Volume 19, number 3, (July, 1980) at page 16 has a coupon to send to A.O. Smith Product Service Division in order to receive a copy of the book "The Winning System" by return mail. This is the same book referred to in subparagraph 63(f)(36). At page 25 of that same issue is another coupon for obtaining the brochure "High Moisture Grains" referred to in the immediately preceding subparagraph.

(39) Volume 19, number 4, (December, 1980) at page 2 is a mail in coupon in order to receive by return mail, the brochure entitled the "The Harvestore System". This brochure has misrepresentations regarding the Harvestore breather bag system on page 5, wherein it states that the Harvestore system needs to breathe too, "but its patented design prevents oxygen from coming into contact with the feed." (See Paragraph 16(g).) The back cover of this same magazine has a request that a reader send money in order to obtain the book "The Winning System" from A.O. Smith Products Service Division. This book was previously referred to above in paragraph 63(f)(36).

(40) Volume 20, number 2, (April, 1981) has a solicitation to obtain the book "The Winning System" from A.O. Smith Products Service Division. This book was previously referred to above in paragraph 63(f)(36).

(41) Volume 20, number 3, (June, 1981) the back cover has a solicitation for a copy of "The Winning System"

to be obtained from A.O. Smith Products Service Division. This book was referred to above in paragraph 63(f)(36).

(42) Volume 20, number 4, (August, 1981) at page 2 has a coupon to obtain the brochure "The Harvestore System" from AOSHPI. This brochure contains false statements regarding Harvestore silos as outlined above. The back cover has a solicitation to obtain a copy of "The Winning System" from A.O. Smith Products Service Division. This book was referred to above in paragraph 63(f)(36)

(43) Volume 20, number 5, (October, 1981) at page 2 has a mail in solicitation for the "Harvestore System" brochure at page 2 from AOSHPI. This is the same brochure as referred to above. The back cover has a solicitation for the book "The Winning System" from A.O. Smith Products Service Division. This book is referred to above in paragraph 63(f)(36).

(44) Volume, number 1 (February 1982) states on page 22 that A.O. Smith Harvestore has the "backing of a company known for quality since 1874." It also has a mail in coupon for the "Harvestore System" brochure. This brochure has misrepresentations concerning the oxygen limiting capabilities of the Harvestore structure on page 5.

(45) Volume 21, number 1 (February 1982) on the back cover has a solicitation for purchasing the book "The Winning System" from A.O. Smith Products Service Division. This book was referred to above at paragraph 63(f)(36).

(46) Volume 21, number 2, (April 1982) at page 2 has a mail in coupon for the brochure the "Harvestore System"

which contains false statements as noted above. On the back cover a solicitation for the book "The Winning System" from A.O. Smith Products Service Division. This book is referred to above at paragraph 63(f)(36).

(47) Volume 21, number 3 (June 1982) has a mail in coupon to obtain the brochure "High Moisture Grains" from AOSHPI. This brochure contains false statements as set out above. The back cover has a solicitation for obtaining a copy of the book "The Winning System" from A.O. Smith Products Service Division. This book was referred to above at paragraph 63(f)(36).

(48) Volume 21, number 4 (August 1982). It states in an article on page 17 that putting alfalfa haylage into a Harvestore "too dry" will not cause it to get hot and ruin the feed as long as the structure is properly managed and maintained. It goes on to state "that heating is caused by a reaction with oxygen, and the structures breather system will limit the access of air no matter what the moisture level of the feed." On page 15 of the same magazine is an advertisement indicating that Harvestore has the backing of a company known for quality since 1874 and has a mail in coupon for the "Harvestore System" brochure, to be received in the mail. (See Paragraph 16(g)).

(49) Volume 21, number 4, (August 1982) at page 4 has a solicitation to purchase the book "The Winning System" by filling out the return card at the center of the issue, which is to be stamped and mailed indicating that the farmer will get a copy and then will be billed for the book. See paragraph 63(f)(36). At page 15, is a mail in coupon to obtain the



"Harvestore System" brochure, which contains false statements as set out above. See Paragraph 16(g).

(50) Volume 21, number 5, (October 1982) at page 2 has a mail in coupon for "The Harvestore System" brochure, which contains false statements as set out above. The same coupon appears at pages 4 and 10 of the magazine. Page 9 has a solicitation to purchase the book "The Winning System" using the "attached post card." See paragraph 63(f)(36). Page 24 has a mail in coupon for the brochure "High Moisture Grains", which has false statements as set out above.

(51) Volume 22, number 1, (February, 1983) at page 4 has a mail in coupon for "The Harvestore System" brochure which has false statements as set out above. (See Paragraph 16(g)). This same coupon appears at page 24.

(52) Volume 22, number 3, (June, 1983) at page 15 has a mail in coupon for the "High Moisture Grain" brochure which has false statements as set out above. On page 22 is a mail in coupon for "The Harvestore System" brochure which has false statements as set out above. (See Paragraph 16(g)).

(53) Volume 22, number 4, (August 1983) has a mail in coupon for "The Harvestore System" brochure at page 22, which brochure contains false statements as set out above. (See Paragraph 16(g)).

(54) Volume 22, number 5 (October 1983) has a mail in coupon for "The Harvestore System" brochure which contains false statements as set out above. (See Paragraph 16(g)).

(55) Volume 23, number 2, (April, 1984) at page 16 is an ad that states "only A.O. Smith Harvestore can give you...the stability of a company known for quality since 1874."

(g) The "Harvestore Farmer" magazine and the "Harvestore System Farming" magazine between AOSHPI and Plaintiffs as well as other farmers throughout the country as outlined at paragraphs 10, 11, 15, 16 and 63(f).

(h) The mailing of fraudulent advertising to "Hoard's Dairyman" magazine, and the mailing of such magazine containing such fraudulent advertising by the publishers to the Plaintiffs and other farmers throughout the country.

(1) Those Hoards Dairyman ads already set out in paragraphs 10, 11, 15, and 16 herein.

(2) On page 81 of the January 25, 1970 issue there is an ad entitled "Profit Taker--Profit Maker." This ad compares stave silos with Harvestore and states that oxygen is more likely to get into the stave silo. It falsely states that oxidation burns much of the total nutrient value of feed stored in a stave silo and that the "oxygen-controlled Harvestore system" locks in more valuable protein and TDN. Ad also includes a coupon inviting the farmer to send for more information from AOSHPI.

(3) On page 215 of the February 25, 1970 issue there is an add entitled "Stalelated--Automated." This ad states that the Harvestore system "locks in" more valuable protein



and TDN. This ad contains a coupon inviting the farmer to send for additional written materials from AOSHPI explaining the benefits of using a Harvestore silo, including the free brochure "Forage--From Field to Feeding."

(4) On page 160 of the March 25, 1970 issue there is an ad entitled "Stalemated--Automated". This ad is identical to the ad identified in paragraph 63(h)(3).

(5) On page 279 of the April 10, 1970 issue there is an ad entitled "Stalemated--Automated." This ad is identical to the ad identified in paragraph 63(h)(3).

(6) On page 718 of the June 25, 1970 issue there is an ad entitled "Stalemated--Automated." This ad is identical to the ad identified in paragraph 63(h)(3).

(7) On page 786 of the July 25, 1970 issue there is an ad entitled "High or Dry?." This ad implies that the use of a high-moisture grain corn unit will result in more palatable feed, reduced storage losses and other advantages. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(8) On page 899 of the August 25, 1970 issue there is an ad entitled "High or Dry?." This ad is identical to the ad identified in paragraph 63(h)(7).

(9) On page 1255 of the December 10, 1970 issue there is an ad entitled "Where The Action Is! This ad claims that the Harvestore breather bags compensate for internal gas pressures, thereby keeping oxygen away from the stored feed.

This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(10) On page 89 of the January 25, 1971 issue there is an ad entitled "Introducing the New Mini." This ad implies that the use of a Harvestore will result in reduced storage losses. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(11) On page 121 of the February 10, 1971 issue there is an ad entitled "Protein--Why Purchase It When You Can Grow It". This ad implies that the use of a Harvestore will result in higher protein feed for cattle. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(12) On page 231 of the February 25, 1971 issue there is an ad entitled "Introducing the New Mini." This ad is identical to the ad identified in paragraph 63(h)(10).

(13) On page 451 of the April 10, 1971 issue there is an ad entitled "Protein--Why Purchase It When You Can Grow It." This ad is identical to the ad identified in paragraph 63(h)(11).

(14) On page 773 of the July 10, 1971 issue there is an ad entitled "Why Dry Corn?" This ad implies that the use of a Harvestore will result in highly nutritious and palatable feed. This ad contains a coupon encouraging the farmer to mail it in to receive additional information and a brochure entitled "High Moisture Grain" from AOSHPI.

(15) On page 851 of the August 10, 1971 issue there is an ad entitled "Why Dry Corn?." This ad is identical to the ad identified in paragraph 63(h)(14).

(16) On page 939 of the September 10, 1971 issue there is an ad entitled "Why Dry Corn?." This ad is identical to the ad identified in paragraph 63(h)(14).

(17) On page 94 of the January 25, 1972 issue there is an ad entitled "This Is Not a Silo!" This ad states that the internal breather system compensates for internal pressure changes. Also implies that AOSHPI has been in business for over 25 years. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a current copy of Harvestore Farmer Magazine.

(18) On page 252 of the January 25, 1972 issue there is an ad entitled "The Big Blue Feed Bank: It Breathes!" This ad states that the breather bag system is designed to keep air away from the stored feed. Also implies that AOSHPI has been in business for 25 years. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a current copy of Harvestore Farmer Magazine.

(19) On page 465 of the April 10, 1972 issue there is an ad entitled "This Bottom Unloader Is Old Enough To Vote. It's Never Had A Day Off." This ad implies that the Goliath unloader can operate for many years without problems. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a current copy of Harvestore Farmer Magazine.

(20) On page 1031 of the September 10, 1972 issue there is an ad entitled "Automatic First In/First Out For 25 Years". This ad implies that AOSHPI has been in business manufacturing Harvestores for 25 years. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a current copy of Harvestore Farmer Magazine.

(21) On page 1111 of the October 10, 1972 issue there is an ad entitled "Automated Feeding?." This ad states that, for 25 years, Harvestore has been a leading manufacturer of automated systems. Implies "Harvestore" and AOS Corporation are one and the same company. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a current copy of Harvestore Farmer Magazine.

(22) On page 71 of the January 10, 1973 issue there is an ad entitled "This Is Not a Silo". This ad is identical to the ad identified in 63(h)(17) above except title of free magazine is entitled Harvestore Farmer.

(23) On page 219 of the February 10, 1973 issue there is an ad entitled "Automatic First In/First Out for 26 Years". This ad states that you get better feed and that routine maintenance of the Goliath unloader is all that is necessary. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including the 1973 24-page buyers guide. (See paragraph 10(a) for outline of falsity in the 1973 Buyer's Guide).

(24) On page 223 of the February 25, 1973 issue there is an ad entitled "Automating Feeding Fact: One Call Can Do



It All". This ad implies that all Harvestore dealers are experts in feed storage automation systems. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free brochure entitled "Feedlot Planning Guide".

(25) On page 629 of the May 10, 1973 issue there is an ad entitled "Expensive? Compared To What?." This ad implies that the use of a Harvestore results in higher quality feed and less storage losses. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free brochure entitled "Forage--From Field to Feeding."

(26) On page 1137 of the September 25, 1973 issue there is an ad entitled "Harvestore Invents the 90-Day Month". This ad implies that the use of Harvestore high-moisture corn all but eliminates spoilage. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free brochure entitled "You Can't Beat the System". (See paragraph 10(a)(10) for an outline of the falsity in "You Can't Beat the System.")

(27) On page 1325 of the November 10, 1973 issue there is an ad entitled "Automated Feeding Fact: One Call Can Do It All" This ad is identical to the ad identified in paragraph 63(h)(24).

(28) On page 105 of the January 25, 1974 issue there is an ad entitled "Twenty-five Years Ago It All Started With Just One". (See paragraph 10(a)(1)).

(29) On page 157 of the February 10, 1974 issue there is an ad entitled "The Sun Never Sets On the Harvestore System". This ad states Harvestores are used around the world, thereby implying a Harvestore will work as promised in any climate. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including booklet "explaining the unique advantages offered by the top-filling, bottom-unloading, oxygen limiting Harvestore System. (See also: paragraph 10(c)(5)).

(30) On page 1253 of the October 25, 1974 issue there is an ad entitled "Time To Change Your Labor Outlook?" This ad implies that the use of a Harvestore structure will be labor saving and will result in higher quality forage. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free brochure entitled "You Can't Beat the System". (The latter brochure is discussed at paragraph 10(a)(10)).

(31) On page 1335 of the November 25, 1974 issue there is an ad entitled "So What's New In The Hay Baling Business?" This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free brochure entitled "You Can't Beat the System". (See Paragraph 10(a)(10)).

(32) On page 1397 of the December 10, 1974 issue there is an ad entitled "Automated Feeding Fact: One Call Can Do It All". This ad is identical to the ad identified in paragraph 63(h)(24).

(33) On page 453 of the April 10, 1975 issue there is an ad entitled "A Harvestore System Gives You The



Opportunity To Have A Good Year, Every Year...In Spite Of The Weather." This ad implies that the use of Harvestores will result in higher quality feed. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(34) On page 711 of the June 10, 1975 issue there is an ad entitled "Weather Beater". This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a copy of the 1975 Harsestore Buyer's Guide. (See paragraph 15(a) for 1975 Buyer's Guide.)

(35) On page 775 of the July 10, 1975 there is an ad entitled "Energy Saver". This ad implies that a Harvestore will pay for itself in five years or less. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI regarding a booklet about the advantages of high moisture grain and a copy of the 1975 Harvestore Buyer's Guide. (See paragraph 15(a) for 1975 Buyer's Guide.)

(36) On page 871 of the July 25, 1975 issue there is an ad entitled "Feed Maker". This ad implies that the Harvestore silo turns forages into a carefully balanced livestock ration, as well as paying for itself in five years or less. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a copy of the 1975 Harvestore Buyer's Guide. (See paragraph 15(a) for 1975 Buyer's Guide.)

(37) On page 393 of the March 25, 1976 issue there is an ad entitled "Alfalfa and Harvestore...Great Together". This

ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including the Haylage Booklet. (See paragraph 16(f) for Haylage Brochure.)

(38) On page 539 of the April 25, 1976 issue there is an ad entitled "If You're Milking 35 Cows or More, It's Time to Take a Close Look at Harvestore". This ad implies that owning a Harvestore will pay for itself. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(39) On page 539 of the April 25, 1976 issue there is an ad entitled "Forage and Harvestore...Great Together!" This ad implies that owning a Harvestore will pay for itself. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a copy of the Forage Booklet.

(40) On page 605 of the May 10, 1976 issue there is an ad entitled "A Word About Haylage From the People Who Invented It." This ad states that Harvestore limited oxygen storage processes haylage through mild, controlled fermentation to make it highly palatable and digestible. Implies that Harvestore feed is like pasturing livestock year-round. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a copy of the Haylage Booklet. (See paragraph 16(f) for Haylage Booklet).

(41) On page 715 of the June 10, 1976 issue there is an ad entitled "Corn and Harvestore...Made for Each Other". This ad states Harvestore limited oxygen processing keeps out

excess oxygen while allowing mild, controlled fermentation. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(42) On the back cover of the July 10, 1976 issue there is an ad entitled "Harvestore Plus High Moisture Corn Equals More Milk Per Acre". This ad implies that the use of a Harvestore will result in higher profits. Fails to inform the buyer of the potential risk of spoilage. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(43) On page 873 of the July 25, 1976 issue there is an ad entitled "Corn and Harvestore...Made For Each Other". This ad is identical to the ad identified in paragraph 63(h)(41).

(44) On page 727 of the January 10, 1977 issue there is an ad entitled "Make Milk With The Water You Are Drying Out Of Your Corn". This ad implies that a Harvestore silo can pay for itself without advising the potential customer of the risks of using the structure.

(45) On page 215 of the February 25, 1977 issue there is an ad entitled "You Can Pay For a Harvestore With the Money Harvestore Saves You". This ad implies that using a Harvestore structure will result in higher net profits and fails to warn potential customer of inherent risks in using a Harvestore structure.

(46) On page 476 of the April 10, 1977 issue there is an ad entitled "You Can Pay For a Harvestore With the Money Harvestore Saves You." This ad is identical to the ad identified in paragraph 63(h)(45).

(47) On page 2 of the June 25, 1977 issue there is an ad entitled "Make Milk With the 15% of Your Feed Supply a Concrete Silo Wastes". This ad states that use of a Harvestore results in less spoilage than other types of storage systems. Fails to warn potential users of the risks in using Harvestore structures.

(48) On the back cover of the July 10, 1977 issue there is an ad entitled "Make Milk With the 15% of Your Feed Supply a Concrete Silo Wastes". This ad is identical to the ad identified in paragraph 63(h)(47).

(49) On page 879 of the July 25, 1977 issue there is an ad entitled "Make Milk With The Water You Are Drying Out Of Your Corn." This ad is identical to the ad identified in paragraph 63(h)(44).

(50) On the back cover of the August 10, 1977 issue there is an ad entitled "Make Milk With The Water You Are Drying Out Of Your Corn". This ad is identical to the ad identified in paragraph 63(h)(44).

(51) On pages 194 and 195 of the February 10, 1978 issue there is an ad entitled "Cut Costs". This ad implies that the use of a Harvestore structure will result in higher net profits by increased production and reduction in money spent on money supplements. Fails to warn potential customers of inherent risks in using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free book about haylage. (See paragraph 16(f) for Haylage brochure.)



(52) On page 745 of the March 25, 1978 issue there is an ad entitled "When Waiting Costs More Than Time... You're Ready". This ad states that field losses are prevented by the use of a Harvestore structure and that animals eat more corn if stored in a Harvestore structure and produce more milk. It states that Harvestore silos can pay for itself by producing more pork, beef or milk from every acre with less labor. It fails to warn potential customers of inherent risks of using Harvestore silos (See Paragraph 26). This ad also contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI.

(53) On page 501 of the April 10, 1978 issue there is an ad entitled "Expand Up." This ad implies that the use of Harvestore forage will allow a farmer to milk more cows on the same amount of land by increased efficiency and quality of feed. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free book about haylage. (See paragraph 16(f) for Haylage brochure).

(54) On page 745 of the March 25, 1978 issue there is an ad entitled "When Waiting Costs More Than Time... You're Ready". This ad is identical to the ad identified in paragraph 63(h)(52).

(55) On the back cover of the July 10, 1978 issue there is an ad entitled "If You're Not looking Forward to Another Winter of Chopping Frozen Silage... You're Ready". This ad implies that the use of a Harvestore system reduces storage losses. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon

encouraging the farmer to mail it in to receive additional information from AOSHPI.

(56) On pages 876 and 877 of the July 25, 1978 issue there is an ad entitled "Break Out". This ad states that feed stored within a Harvestore corn unit is of higher quality than other storage methods. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free book about haylage.

(57) On pages 1244 and 1245 of the October 25, 1978 issue there is an ad entitled "Cut Costs". This ad is identical to the ad identified in paragraph 63(h)(51).

(58) On pages 158 and 159 of the February 10, 1979 issue there is an ad entitled "Here's Why First-In, First-Out Feeding Is Best For You And Your Livestock". This ad implies that the unloader system is built to require minimum maintenance. Also implies that the product line of Harvestore has improved over the last 30 years, each year, thus confusing and distinction between AOS and AOSHPI. Fails to warn potential customers of inherent risks of using Harvestore silos. Includes toll-free number to obtain additional information on Harvestore silos.

(59) On page 350 and 351 of the March 10, 1979 issue there is an ad entitled "Some Folks Say It Takes 60 Cows To Make a Harvestore System Pay. Don't Believe It". This ad states that air does not touch the feed stored within a Harvestore silo due to the breather bag system and demonstrates this point with a diagram. Fails to warn



potential customers of inherent risks of using Harvestore silos. Includes toll-free number for additional information on Harvestore silos.

(60) On page 666 and 667 of the May 10, 1979 issue there is an ad entitled "36,000 Farmers Will Do Less Hard Work Today Than You Do." This ad states that a Harvestore system controls oxygen to prevent excessive storage losses. Fails to advise farmers of risk of loss of feed arising out of push button unloading, as well as significant expenses associated with maintenance of the silo and unloader, the latter being work that must be paid for because the farmer can't do it himself. States that expansion of herds can be done because a Harvestore owner can get more feed from every acre because the feed quality is better. Implies that AOSHPI has been building Harvestores for 30 years and they have been improved each of those years, thus confusing the AOS/AOSHPI relationship. Fails to warn potential customers of inherent risks of using Harvestore silos. Includes toll-free number for additional information on Harvestore silos.

(61) On page 954 and 955 of the July 25, 1979 there is an ad entitled "There's Only One Way To Escape The High Cost of Drying Grain. Don't Dry It". This ad states that air does not touch the feed stored within a Harvestore silo due to the breather bag system and demonstrates this point with a diagram that doesn't show the pressure relief valve allowing outside air to directly contact the feed. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI; includes toll-free number for more information on Harvestore silos.

(62) On page 854 and 855 of the July 25, 1979 issue there is an ad entitled "Five Reasons Why Cornlage Is Better Than Corn Silage". This ad states air does not touch feed stored within a Harvestore silo due to breather bag system and demonstrates this point with a diagram. Fails to warn potential customers of inherent risks of using Harvestore silos. Includes toll-free number for additional information on Harvestore silos.

(63) On page 1150 and 1151 of the September 10, 1979 issue there is an ad entitled "Here's Why First-In, First-Out Feeding Is Best For You And Your Livestock". This ad is identical to the ad identified in 63(h)(58) above. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI; includes toll-free number.

(64) On pages 1492 and 1493 of the November 25, 1979 issue there is an ad entitled "You're Probably Paying For a Harvestore System. Why Don't You Own One?" This ad states that air does not touch the feed stored within a Harvestore silo due to the breather bag system and demonstrates this point with a diagram that doesn't show the pressure relief valve allowing outside air to directly contact the feed. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI; includes toll-free number for more information on Harvestore silos.

(65) On page 1554 of the December 10, 1979 issue there is an ad entitled "Some Folks Say It Takes 60 Cows To Make a Harvestore System Pay. Don't Believe It". This ad is

identical to the ad identified in (63(h)(59) above. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI; includes toll-free number for more information on Harvestore silos.

(66) On page 1555 of the December 25, 1979 issue there is an ad entitled "Some Folks Say It Takes 60 Cows to Make a Harvestore System Pay. Don't Believe It". This ad is identical to the ad identified in (63(h)(59) above. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI; includes a toll-free number for more information on Harvestore silos.

(67) On page 737 of the May 10, 1980 issue there is an ad entitled "Finicky Eaters? Not With Harvestore System Haylage". This ad states that the breather bag system prevents oxygen from coming into contact with the feed and demonstrates this with a diagram. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including booklet "Harvestore System Haylage".

(68) On page 1082 of the August 10, 1980 issue there is an ad entitled "Cornlage is Better Than Corn Silage." This ad states that Harvestore silos control excess spoilage by limiting oxygen. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including booklet entitled "Cornlage."

(69) On page 1174 of the September 10, 1980 issue there is an ad entitled "Cornlage is Better Than Corn Silage". This ad is identical to the ad identified in paragraph 63(h)(68).

(70) On page 1371 of the October 10, 1980 issue there is an ad entitled "Finicky Eaters? Not With Harvestore System Haylage". This ad is identical to the ad identified in paragraph 63(h)(67).

(71) On page 1504 of the November 10, 1980 issue there is an ad entitled "Finicky Eaters? Not With Harvestore System Haylage". This ad is identical to the ad identified in paragraph 63(h)(67).

(72) On page 24 and 25 of the January 10, 1981 issue there is an ad entitled "I Feed More of What I Grow, and I Don't Work As Hard". This ad implies that use of a Harvestore structure will result in more feed out of every acre by reducing storage losses and more production out of every animal. This ad also falsely implies that higher-quality feed comes from forages stored in a Harvestore. Fails to warn potential customers of inherent risks of using Harvestore silos.

(73) On page 376 and 377 of the March 10, 1981 issue there is an ad entitled "We Don't Buy Feed, We Worry Less About The Weather, and Our Milk Production's Up." This ad implies that use of a Harvestore structure will result in more feed out of every acre by reducing storage losses and more production out of every animal. This ad also falsely implies that higher-quality feed comes from forages stored in a Harvestore. Fails to warn potential customers of inherent risks of using Harvestore silos.



(74) On page 940 and 941 of the July 10, 1981 issue there is an ad entitled "I Don't Pay to Dry Corn, I Go Directly From Field to Storage, and My Cows Never Had Better Feed". This ad implies that use of a Harvestore structure will result in more feed out of every acre by reducing storage losses and more production out of every animal. This ad also falsely implies that higher-quality feed comes from forages stored in a Harvestore. Fails to warn potential customers of inherent risks of using Harvestore silos.

(75) On page 1322 and 1323 of the October 10, 1981 issue there is an ad entitled "We Don't Buy Feed, We Worry Less About The Weather, and Our Milk Production's Up". This ad is identical to the ad identified in paragraph 63(h)(73).

(76) On page 40 and 41 of the January 10, 1982 issue there is an ad entitled "Get a Complete Harvestore System That's Right for You". This ad states that AOSHPI originated bottom unloading when Harry Truman was in the White House, when, in fact, AOSHPI was not created by AOS until 1961. Fails to warn potential customers of inherent risks of using Harvestore silos.

(77) On page 217 of the February 10, 1982 issue there is an ad entitled "We Don't Buy Feed, We Worry Less About The Weather, and Our Milk Production's Up. That's Why". This ad implies that, by using a Harvestore silo, a customer will increase production and decrease costs. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including the booklet entitled "The Harvestore System". (See paragraph 16(g) for the Harvestore System Brochure).

(78) On page 391 of the March 10, 1982 issue there is an ad entitled "How To Produce More Milk From Your Acres". This ad implies that, by using a Harvestore silo, a customer will increase production and decrease costs. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including the booklet "The Harvestore System". (See paragraph 16(g) for the Harvestore System Brochure).

(79) On page 703 of the May 10, 1982 issue there is an ad entitled "How To Produce More Milk From Your Acres". This ad is identical to the ad identified in paragraph 63(h)(78).

(80) On page 792 of the June 10, 1982 issue there is an ad entitled "Here Today, Here Tomorrow". This ad implies that, by using a Harvestore silo, a customer will increase production and decrease costs. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including a free booklet entitled "The Harvestore System". (See paragraph 16(g) for the Harvestore System Brochure).

(81) On page 974 of the August 10, 1982 issue there is an ad entitled "How To Produce Milk At less Cost". This ad implies that, by using a Harvestore silo, a customer will increase production and decrease costs. Fails to warn potential customers of inherent risks of using Harvestore silos. This ad contains a coupon encouraging the farmer to mail it in to receive additional information from AOSHPI, including free booklet entitled "The Harvestore System". (See paragraph 16(g) for the Harvestore System Brochure).



(82) On page 1079 of the August 25, 1982 issue there is an ad entitled "How To Produce Milk At Less Cost". This ad is identical to the ad identified in paragraph 63(h)(81).

(83) On page 1383 of the October 25, 1982 issue there is an ad entitled "Here Today, Here Tomorrow". This ad is identical to the ad identified in paragraph 63(h)(80).

(84) On page 999 of the August 10, 1983 issue there is an ad entitled "High Moisture Gains". This ad implies that forage stored in a Harvestore system results in higher-quality feed. Fails to warn potential customers of inherent risks of using Harvestore silos.

(85) On page 78 of the January 25, 1984 issue there is an ad entitled "Your Decision is His Future". This ad implies that, by using a Harvestore silo, a customer will increase production and decrease costs. Fails to warn potential customers of inherent risks of using Harvestore silos.

(86) On page 407 of the March 25, 1984 issue there is an ad entitled "It Wasn't a Question of Cost. It Was A Matter of Profit". This ad implies that, by using a Harvestore silo, a customer will increase production and decrease costs. Fails to warn potential customers of inherent risks of using Harvestore silos. (See paragraph 15(aa).)

(87) On page 771 of the June 25, 1984 issue there is an ad entitled "Your Decision is His Future". This ad is identical to the ad identified in paragraph 63(h)(85).

(88) On page 850 of the July 25, 1984 issue there is an ad entitled "It Wasn't a Question of Cost. It Was A Matter of

Profit". This ad is identical to the ad identified in paragraph 63(h)(86).

(89) On page 1124 of the October 25, 1985 issue there is an ad entitled "Here's How We're Working Today...for a More Efficient Tomorrow!" This ad states that various changes in the design of the Harvestore structure have made in better. Fails to warn potential customers of inherent risks of using Harvestore Silos.

(i) Information regarding the owners list, warranty program, and repair pacts between AOS and authorized Harvestore structure dealers and between AOS and Dave Brown & Associates;

(j) Dealer training manuals between AOSHPI, MVBA and between AOS and AOSHPI;

(k) Interoffice memoranda between AOSHPI and AOS, including those memoranda referred to at paragraph 26 above;

(l) Research and development reports between AOSHPI and AOS, including those reports referred at paragraph 26 above;

(m) Movies and films, including those referred to at paragraph 10, between Defendants and MVBA, between Defendants and other dealers, between Defendants and Venard Film Library, and between Venard Film Library and television

stations, and/or schools, colleges, and universities across the country.

64. Each of these transmittals by mail related to:

(a) Materials that were used to execute or in furtherance of the scheme to sell Harvestore structures through fraudulent representations made to Plaintiffs and farmers throughout the country by AOS and AOSHPI; or

(b) Materials that demonstrated the falsity of the representations made by AOS and AOSHPI to Plaintiffs and farmers throughout the country; or

(c) Materials that demonstrated the scheme to conceal known product defects from Plaintiffs, other farmers throughout the country, and from MVBA and the Dealer Organization.

65. Each use by MVBA, AOSHPI, and AOS of the United States mails to transmit this information constituted an act of mail fraud within the meaning of 18 U.S.C. § 1961(1)(b).

66. In connection with the representations made by AOS and AOSHPI to Plaintiffs prior to and after the sale of the Harvestore structure to Plaintiffs, MVBA, AOSHPI and AOS used the interstate telephone lines or caused the interstate telephone lines to be used on at least 25 occasions between June 1973 and March 1991 to transmit information regarding:

(a) Sales literature and/or sales aides furnished by either and/or both AOS and AOSHPI to Plaintiffs, farmers throughout the country, MVBA and other authorized dealers concerning the "oxygen limiting" capabilities of the Harvestore structure, including the items referred to at paragraph 10. In particular, established telephone numbers for the use of farmers, dealers, and salesmen, such as the "Harvestore Blue Hot-Line-312-439-1530" (See Harvestore Farmer, Vol 11, number 1, January-February 1972, page 9); 800-528-6050 ext. 656 Harvestore System Farming Magazine, Vol. 18, number 1 (February 1979), p. 25; Vol. 18, number 2 (April 1979) p. 25; Vol. 18, number 3 (June 1979) page 9; Vol. 18, number 4 (October 1979) p. 9; Vol. 18, number 5 (December 1979) p. 25; 815-756-1551 Vol. 26, number 2 (Fall 1987) p. 13; Vol. 27, number 2 (Fall 1988) p. 11; Vol. 28, number 2 (Fall 1979) p. 12.

(b) Interoffice memoranda generated by AOSHPI and AOS concerning the performance of the Harvestore structures and specifically its "oxygen limiting" capabilities, including the memoranda referred to as paragraph 26.

(c) Research and development reports generated by AOSHPI and AOS concerning the performance of the Harvestore structure and specifically its "oxygen limiting" capabilities, including the memoranda referred to at paragraph 26.

(d) Information regarding sales transactions, between Defendants, MVBA and other authorized dealers including copies of orders for Harvestore silos. (See Dealer Management Guide 710).

(e) Films between Defendants and Venard Film Library, and information regarding borrowing films, including Magic of Harvestore Storage, regarding Harvestore silos between Venard Film Library and colleges, schools, universities and television stations from 1970 to 1993.

67. Each of these transmittals by wire related to:

(a) Information that was used to execute or further fraudulent representations made to Plaintiffs and farmers throughout the country about the "oxygen limiting" and feed storage capabilities of the Harvestore structure; or

(b) Information and materials that establish the falsity of the representations made by AOS and AOSHPI to Plaintiffs and farmers throughout the county about the "oxygen limiting" and feed storage capabilities of the Harvestore structure.

68. Each use by the Dealer Organization, MVBA, AOS, AOSHPI and Venard Film Library of the interstate telephone lines to transmit the information constitute an act of wire fraud within the meaning of 18 U.S.C. § 1961(1)(b).

69. The actions of the Dealer Organization, MVBA, AOSHPI and AOS, as summarized in paragraphs 63 through 68, constitute a "pattern of racketeering activity" as that term is defined in 18 U.S.C. § 1961(5), in that its actions affecting Plaintiffs and farmers throughout the country were related, spanned a period of at least seventeen (17) years and by their nature pose a continuing threat of racketeering activity.

70. At all times herein mentioned, AOS, AOSHPI, the Dealer Organization and MVBA, both directly and by and through their agents, representatives, and/or employees, transmitted these materials and made these fraudulent representations to the Plaintiffs and other farmers throughout the country.

71. AOSHPI, AOS, MVBA, and/or the Dealer Organization through their association in fact in developing, marketing and selling Harvestore structures through fraudulent representations is an enterprise engaged in and affecting interstate and foreign commerce within the meaning of 18 U.S.C. § 1961(4). AOS and AOSHPI are the perpetrators of the racketeering activity, using MVBA and/or the Dealer Organization as the passive instrument of this activity.

72. In the alternative, the Dealer Organization and/or MVBA is the enterprise in fact within the meaning of 18 U.S.C. § 1961(4), which as a conduit and passive instrument, was used by AOS and AOSHPI to perpetrate the pattern of racketeering activity involved in the sale and marketing of Harvestore structures.



73. AOS, while associated with the enterprise, participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c).

74. AOSHPI, while associated with the enterprise, participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c).

75. As a direct and proximate result of AOSHPI and AOS participation in the conduct of the affairs of the enterprise through a pattern of racketeering activity, Plaintiffs have suffered substantial damages as outlined at paragraph 31.

#### COUNT IV

##### RICO § 1962(a) - AOS AND AOSHPI

76. Plaintiffs incorporate by reference paragraphs 1 through 75.

77. AOS, through its association in fact with the enterprise comprised of AOS, AOSHPI, MVBA, and/or the Dealer Organization (or alternatively, MVBA and/or the Dealer Organization as the enterprise as outlined in paragraph 72) participated as principals in the pattern of racketeering activity within the meaning of 18 U.S.C. § 1962 (a) and invested the monies generated from the sale of the Harvestore structures secured through the pattern of racketeering activity in the operation of its business activities, and, in particular, used these proceeds to (A) fund the continuing marketing and sale of Harvestore structures as "oxygen limiting" feed storage structures, and (B) also funded post-sale misrepresentations to

Plaintiffs and other farmers, including, but not limited to magazines, movies, and other literature, and (C) also funded efforts to conceal known product defects from Plaintiffs, other farmers similarly situated, MVBA and other Harvestore dealers, and (D) also funded Agristor Credit Corporation, which is a separate, wholly-owned subsidiary of AOS, whose sole business is the financing of the sale or lease of AOSHPI products (both to the farmer and to members of the Dealer Organization), and the profits of which inure solely to the benefit of AOS.

78. This investment of proceeds by AOS to perpetuate and further its racketeering activities, through the methods described above, of the Harvestore structures to Plaintiffs and to farmers throughout the country over a period spanning at least 1973 to 1991, constitutes of violation of 18 U.S.C. § 1962(a).

79. AOSHPI, through its association in fact with the enterprise comprised of AOS, AOSHPI, MVBA, and/or the Dealer Organization (or alternatively MVBA and/or the Dealer Organization or the enterprise as outlined in Paragraph 72), participated as a principal in the pattern of racketeering activity within the meaning of 18 U.S.C. § 1962(a) and invested the monies generated from the sale of the Harvestore structures secured through the pattern of racketeering activity in the operation of its business activities, and, in particular, used these proceeds to (A) fund the continuing marketing and sale of Harvestore structures as "oxygen limiting" feed storage structures, and (B) also funded post-sale misrepresentations to Plaintiffs and other farmers, including, but not limited to magazines, movies, and other literature, and (C) also funded efforts to conceal known product defects from Plaintiffs, other

farmers similarly situated, MVBA and other Harvestore dealers, and (D) also funded Agristor Credit Corporation, which is a separate, wholly-owned subsidiary of AOS, whose sole business is the financing of the sale or lease of AOSHPI products (both to the farmer and to members of the Dealer Organization), and the profits of which inure solely to the benefit of AOS.

80. This investment of proceeds by AOSHPI to perpetuate and further its racketeering activities, through the methods described above, of Harvestore structures to Plaintiffs and to farmers throughout the country over a period of spanning at least 1973 to 1986, constitutes a violation of 18 U.S.C. § 1962(a).

81. Plaintiffs and farmers throughout the country suffered direct and specific injury from AOS and AOSHPI's investment of the proceeds of its racketeering activity into that portion of its business operations tied to marketing and selling Harvestore structures because it was by and through AOS and AOSHPI's that Plaintiffs and farmers across the country were prevented from learning the truth about defects in Harvestore structures, and were thereby caused to continue to use their Harvestore silos and continued to suffer damage as a result thereof. Without the investment of the proceeds of the racketeering activity, the falsity of Defendants representations would have been made known sooner to the Plaintiffs and other farmers throughout the country, thereby significantly decreasing the damages to such persons.

82. As a direct and proximate result of the reinvestment of income illegally obtained by AOS and

AOSHPI, the Plaintiffs have incurred substantial damages as outlined at paragraph 31.

COUNT V  
NEGLIGENT MISREPRESENTATION - AOS AND  
AOSHPI

83. Plaintiffs reallege paragraphs 1 through 82.

84. Plaintiffs reallege the same conduct as outlined in paragraphs 1 through 82 herein but allege in the alternative that the conduct of the Defendants was negligent as opposed to intentional.

85. Such conduct, even though negligent, was done with reckless disregard to the rights of the Plaintiffs.

86. As a direct and proximate result of the activities of AOS and AOSHPI, the Plaintiffs have incurred substantial damages.

COUNT VI  
VIOLATION OF FALSE ADVERTISING STATUTE -  
MINN. STAT. 325F.67

87. Plaintiffs reallege paragraphs 1 through 86 herein.

88. The Defendants conduct as outlined above, whether the same be intentional or negligent, constitutes a violation of the Minnesota False Advertising Statute, Minn. Stat. 325F.67, entitling the Plaintiffs to an award of



compensatory damages, attorney fees, and reasonable costs of investigation and injunctive relief pursuant to Minn. Stat. 8.31.

COUNT VII  
VIOLATION OF CONSUMER FRAUD ACT - MINN.  
STAT. 325F.68-70

89. Plaintiffs reallege paragraphs 1 through 88 herein.

90. That Defendants conduct as outlined above, constitutes a violation of the Minnesota Consumer Fraud Act, Minn. Stat. 325F.68-70 and also entitles Plaintiffs to an award of attorney fees, compensatory damages, and reasonable costs of investigation and injunctive relief pursuant to Minn. Stat. 8.31.

COUNT VIII  
MISREPRESENTATION OF QUALITY - MINN. STAT.  
325D.13 ET SEQ.

91. Plaintiffs reallege paragraphs 1 through 90 herein.

92. That Defendants conduct as outlined above constitutes a misrepresentation of quality, in violation of Minn. Stat. 325D.13, entitling Plaintiffs to damages, attorney fees and injunctive relief pursuant to Minn. Stat. 325D.15.

COUNT IX  
VIOLATION OF UNIFORM DECEPTIVE TRADE  
PRACTICES ACT  
MINN. STAT. 325D.44

93. Plaintiffs reallege paragraphs 1 through 92 herein.

94. That the conduct of the Defendants as outlined above, constitutes a violation of Minn. Stat. 325D.44, subd. 1(1), (2), (3), (4), (5), (7), (8), (9), (13).

95. Plaintiffs are entitled to damages, attorney fees, and injunctive relief for such violations pursuant to Minn. Stat. 325D.45.

96. As a direct and proximate result of the activities of AOS and AOSHPI, the Plaintiffs have incurred substantial damages.

WHEREFORE, Plaintiffs request this Court to enter a judgment in their favor and against Defendants for an amount not less than \$50,000.00 and in a sum three times the actual damages proved at trial, attorney fees, costs and disbursements, and reasonable expenses for investigation, interest and that the court (a) enjoin all unlawful practices, (b) and enjoin the sale of Harvestore silos, and (c) require that the Defendants publish to Harvestore farmers information concerning known product defects.

Dated this 26th day of November, 1993.

BIRD AND JACOBSEN

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**(Affidavit of Service Omitted in Printing)**

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

**Case No. 3:94-424**

**MARVIN KLEHR and MARY KLEHR,**

**Plaintiffs,**

**vs.**

**A.O. SMITH CORPORATION and  
A.O. SMITH HARVESTORE PRODUCTS,  
INC., Jointly and Severally,**

**Defendants.**

**DEFENDANT A.O. SMITH CORPORATION'S  
ANSWER  
TO AMENDED COMPLAINT**

---

Defendant, A.O. Smith Corporation ("Smith"), for its Answer to Plaintiff's Amended Complaint, states as follows:

1. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Amended Complaint and, accordingly, denies those allegations.

2. Smith admits that it is a Delaware corporation, that it is a diversified manufacturer of a variety of products

and services including automobile frames and water heaters and that, in the late 1940's until 1961, it researched, designed, patented, manufactured and marketed Harvestore feed storage structures. Smith denies the remaining allegations contained in paragraph 2 of the Amended Complaint.

3. Smith admits the allegations contained in paragraph 3 of the Amended Complaint except Smith denies that AOSHPI was "incorporated in June 1961 by AOS".

4. Smith admits that Minnesota Valley Breeders Association ("MVBA") is a Minnesota company doing business in the State of Minnesota and has been engaged in the business of selling, distributing, installing, assembling, servicing, repairing and modifying farm equipment, machinery and structures. Smith denies the remaining allegations contained in paragraph 4 of the Amended Complaint.

#### Jurisdiction

5. Smith admits that plaintiff's Amended Complaint purports to assert an amount in controversy exceeding \$50,000 exclusive of interest and costs but denies that plaintiffs have stated a claim against Smith exceeding that amount.

6. Smith admits that plaintiffs purport to base jurisdiction on Title 28 U.S.C. §1331, 28 U.S.C. §1332, and 18 U.S.C. §1961 et seq.

#### General Allegations

7. Smith admits that from 1949 to 1961 it marketed Harvestore feed storage structures and that from 1961 to the present AOSHPI has marketed Harvestore feed storage structures for a total sales volume of approximately 75,000 in the aggregate. Smith denies the remaining allegations contained in paragraph 7 of the Amended Complaint.

8. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Amended Complaint and, accordingly, denies those allegations.

9. Smith admits that the term "haylage" is one that it first used in the 1940's and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 9 of the Amended Complaint and, accordingly, denies those allegations.

10. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 including subparagraphs (a)-(d) of the Amended Complaint regarding what, when and how plaintiffs received the alleged various sales literature, or as to plaintiffs' knowledge, beliefs, judgments, misjudgments, actions, inactions and other conduct before, during and after they allegedly received the various sales literature and, accordingly, denies those allegations. Answering further, Smith states that the form and content of the alleged various sales literature speak for themselves and affirmatively denies that any false, misleading or confusing material statement is contained therein. Smith lacks knowledge or information sufficient to



form a belief as to the truth of the allegation that the Harvestore Farmer magazine (later named Harvestore System Farming) was published by AOSHPI and produced by Dave Brown & Associates, Chicago, Illinois, that before publication, each issue was submitted to Smith for approval and that each issue of the Harvestore Farmer magazine was thereafter transferred to Missouri where it was printed and mailed to farmers and dealers and, accordingly, denies those allegations. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations that all advertisements of the Harvestore silos contained in the Hoard's Dairyman magazine were submitted to Smith for approval before being published and that defendants used the U.S. mails to deliver advertising copy to Hoard's Dairyman magazine with the expectation and knowledge that the magazine would be mailed to plaintiffs and other farmers similarly situated and, accordingly, denies those allegations. Smith denies each and every remaining allegation contained in paragraph 10 including subparagraphs (a)-(d) of the Amended Complaint.

11. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the Amended Complaint and, accordingly, denies those allegations.

12. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the Amended Complaint and, accordingly, denies those allegations.

13. Smith denies that it maintained all warranty files and administered claims regarding Harvestore silos and lacks

information or knowledge sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 13 of the Amended Complaint and, accordingly, denies those allegations.

14. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the Amended Complaint and, accordingly, denies those allegations.

15. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 including subparagraphs (a)-(cc) of the Amended Complaint regarding whether, what, when and how plaintiffs received the alleged magazines, or what plaintiffs believed, relied upon, understood, questioned, felt was important, realized or otherwise knew with regard to any of those allegations and, accordingly, denies them. Smith states that the contents of the magazines alleged in paragraph 15 of the Amended Complaint speak for themselves and Smith affirmatively denies that they contain any false, misleading or confusing material statements, omissions or depictions. Smith denies each and every remaining allegation contained in paragraph 15 of the Amended Complaint.

16. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 including subparagraphs (a)-(i) of the Amended Complaint regarding whether, what, when and how plaintiffs received the alleged magazines and films, or what plaintiffs believed, relied upon, understood, questioned, felt was important, realized or otherwise knew with regard to any of those allegations and, accordingly, denies them. Smith states



that the contents of the magazines and films alleged in paragraph 16 of the Amended Complaint speak for themselves and Smith affirmatively denies that they contain any false, misleading or confusing material statements, omissions or depictions. Smith denies each and every remaining allegation contained in paragraph 16 including subparagraphs (a)-(i) of the Amended Complaint.

17. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the Amended Complaint regarding what representations were made to plaintiffs or what plaintiffs believed to be material and, accordingly, denies those allegations. Smith denies the remaining allegations contained in paragraph 17 of the Amended Complaint.

18. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Amended Complaint and, accordingly, denies those allegations.

19. Smith denies the allegations contained in paragraph 19 of the Amended Complaint.

20. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations of what plaintiffs believed, relied upon or thought material and, accordingly, denies those allegations. Smith denies the remaining allegations contained in paragraph 20 of the Amended Complaint.

21. Smith denies the allegations contained in paragraph 21 of the Amended Complaint.

22. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the Amended Complaint and, accordingly, denies those allegations.

23. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the Amended Complaint and, accordingly, denies those allegations.

24. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the Amended Complaint and, accordingly, denies those allegations.

25. Smith denies the allegations contained in paragraph 25 of the Amended Complaint.

26. Smith denies the allegations contained in paragraph 26 of the Amended Complaint.

27. Smith denies the allegations contained in paragraph 27 of the Amended Complaint. In the event plaintiffs attempt to assert a claim for punitive damages pursuant to the allegations contained in paragraph 27 of the Amended Complaint, such a claim is premature and in violation of Minn. Stat. §549.121.

28. Smith denies the allegations contained in paragraph 28 of the Amended Complaint.

29. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in

paragraph 29 of the Amended Complaint and, accordingly, denies those allegations.

30. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30 of the Amended Complaint and, accordingly, denies those allegations.

31. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 of the Amended Complaint that in the months and years after Plaintiffs stopped using the 25' x 80' Harvestore silo, Plaintiffs' milk production increased dramatically and they became convinced that the Harvestore structure was responsible for their dairy herd problems and, accordingly, denies those allegations. Smith denies each and every remaining allegation contained in paragraph 31 of the Amended Complaint.

#### COUNT I FRAUD - AOSHPI

32. Smith incorporates by reference its answers to paragraph 1 through 31 as its answer to paragraph 32 of Count I of the Amended Complaint.

33. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 33 of Count I of the Amended Complaint and, accordingly, denies those allegations.

34. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 34 of Count I of the Amended Complaint and, accordingly, denies those allegations.

35. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 35 of Count I of the Amended Complaint and, accordingly, denies those allegations.

36. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 36 of Count I of the Amended Complaint and, accordingly, denies those allegations.

37. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 37 of Count I of the Amended Complaint and, accordingly, denies those allegations.

38. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 38 of Count I of the Amended Complaint and, accordingly, denies those allegations.

39. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 39 of Count I of the Amended Complaint and, accordingly, denies those allegations.

40. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in



paragraph 40 of Count I of the Amended Complaint and, accordingly, denies those allegations.

41. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 41 of Count I of the Amended Complaint and, accordingly, denies those allegations.

42. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 42 of Count I of the Amended Complaint and, accordingly, denies those allegations.

43. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 43 of Count I of the Amended Complaint and, accordingly, denies those allegations.

44. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 44 of Count I of the Amended Complaint and, accordingly, denies those allegations.

45. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 45 of Count I of the Amended Complaint and, accordingly, denies those allegations.

46. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 46 of Count I of the Amended Complaint and, accordingly, denies those allegations.

47. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 47 of Count I of the Amended Complaint and, accordingly, denies those allegations.

48. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 48 of Count I of the Amended Complaint and, accordingly, denies those allegations.

49. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 49 of Count I of the Amended Complaint and, accordingly, denies those allegations. In the event plaintiffs attempt to assert a claim for punitive damages pursuant to the allegations contained in paragraph 49 of Count I of the Amended Complaint, such a claim is premature and in violation of Minn. Stat. §549.121.

## COUNT II Fraud - AOS

50. Smith incorporates by reference its answers to paragraph 1 through 49 as its answer to paragraph 50 of Count II of the Amended Complaint.

51. Smith denies the allegations contained in paragraph 51 of Count II of the Amended Complaint.

52. Smith admits that, from time to time, it rendered certain research and development services and was engaged in the distribution of replacement parts for AOSHPI, for which Smith was compensated by AOSHPI, concerning Harvestore



structures of the type purchased by plaintiffs and denies the remaining allegations contained in paragraph 52 of Count II of the Amended Complaint.

53. Smith admits that, from time to time, AOSHPI retained the legal services of Smith's Law Department, for which Smith was compensated by AOSHPI but lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 53 of Count II of the Amended Complaint as to whether it reviewed any Harvestore structure sales training materials, all sales literature and all films made available by AOSHPI to its authorized dealers and, accordingly, denies those allegations. Smith admits that, from time to time, it provided AOSHPI with some printing and distribution services for which Smith was compensated by AOSHPI. Smith lacks knowledge or information sufficient to form a belief as to the definition of "promotional materials," cannot formulate a response to that allegation and, accordingly, denies that allegation. Smith lacks knowledge or information sufficient to form a belief as to what materials were allegedly furnished to plaintiffs and, accordingly, denies those allegations. Answering further, Smith denies the remaining allegations contained in paragraph 53 of Count II of the Amended Complaint.

54. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 54 of Count II of the Amended Complaint as to whether it approved the content of any sales training materials, all sales literature, all films and all magazines regarding the Harvestore structure or as to what representations were received by plaintiffs and material to their decision to purchase the Harvestore structure, as well as the continued use,

operation, maintenance and repair of such structure and, accordingly, denies those allegations. Smith lacks knowledge or information sufficient to form a belief as to the definition of "promotional materials," cannot formulate a response to that allegation and, accordingly, denies that allegation. Smith denies the remaining allegations in paragraph 54 of Count II of the Amended Complaint.

55. Smith denies the allegations contained in paragraph 55 of Count II of the Amended Complaint.

56. Smith denies the allegations contained in paragraph 56 of Count II of the Amended Complaint.

57. Smith denies the allegations contained in paragraph 57 of Count II of the Amended Complaint.

58. Smith denies the allegations contained in paragraph 58 of Count II of the Amended Complaint.

59. Smith lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 59 of Count II of the Amended Complaint and, accordingly, denies those allegations.

60. Smith denies the allegations contained in paragraph 60 of Count II of the Amended Complaint.

61. Smith denies the allegations contained in paragraph 61 of Count II of the Amended Complaint. In the event plaintiffs attempt to assert a claim for punitive damages pursuant to the allegations contained in paragraph 61 of Count

II of the Amended Complaint, such a claim is premature and in violation of Minn. Stat. §549.121.

### COUNT III

#### RICO 1962(c) - AOS AND AOSHPI

62. Smith incorporates by reference its answers to paragraphs 1 through 61 as its answer to paragraph 62 of Count III of the Amended Complaint.

63. Smith admits that it used the mails in the ordinary course of its business for ordinary business activities and denies that such use was in furtherance of any scheme to defraud plaintiffs or others. Smith lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 63, including subparagraphs (a)-(m), of Count III of the Amended Complaint regarding alleged representations made to plaintiffs and, accordingly, denies those allegations.

64. Smith denies the allegations contained in paragraph 64, including subparagraphs (a)-(c), of Count III of the Amended Complaint.

65. Smith denies the allegations contained in paragraph 65 of Count III of the Amended Complaint.

66. Smith admits that it used interstate telephone lines in the ordinary course of its business for ordinary business activities and denies that such use was in furtherance of any scheme to defraud plaintiffs or others. Smith lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 66, including

subparagraphs (a)-(e), of Count III of the Amended Complaint regarding alleged representations made to plaintiffs and, accordingly, denies those allegations.

67. Smith denies the allegations contained in paragraph 57, including subparagraphs (a)-(b), of Count III of the Amended Complaint.

68. Smith denies the allegations contained in paragraph 68 of Count III of the Amended Complaint.

69. Smith denies the allegations contained in paragraph 69 of Count III of the Amended Complaint.

70. Smith denies the allegations contained in paragraph 70 of Count III of the Amended Complaint.

71. Smith denies the allegations contained in paragraph 71 of Count III of the Amended Complaint.

72. Smith denies the allegations contained in paragraph 72 of Count III of the Amended Complaint.

73. Smith denies the allegations contained in paragraph 73 of Count III of the Amended Complaint.

74. Smith denies the allegations contained in paragraph 74 of Count III of the Amended Complaint.

75. Smith denies the allegations contained in paragraph 75 of Count III of the Amended Complaint.



COUNT IV  
RICO 1962(a) - Smith AND AOSHPI

76. Smith incorporates by reference its answers to paragraphs 1 through 75 as its answer to paragraph 76 of Count IV of the Amended Complaint.

77. Smith denies the allegations contained in paragraph 77 of Count IV of the Amended Complaint.

78. Smith denies the allegations contained in paragraph 78 of Count IV of the Amended Complaint.

79. Smith denies the allegations contained in paragraph 79 of Count IV of the Amended Complaint.

80. Smith denies the allegations contained in paragraph 80 of Count IV of the Amended Complaint.

81. Smith denies the allegations contained in paragraph 81 of Count IV of the Amended Complaint.

82. Smith denies the allegations contained in paragraph 82 of Count IV of the Amended Complaint.

COUNT V  
NEGLIGENT MISREPRESENTATION -  
SMITH AND AOSHPI

83. Smith incorporates by reference its answers to paragraphs 1 through 82 as its answer to paragraph 83 of Count V of the Amended Complaint.

84. Smith incorporates by reference its answers to paragraphs 1 through 82 as its answer to paragraph 84 of Count V of the Amended Complaint. Smith denies that its conduct was either negligent or intentional.

85. Smith denies the allegations contained in paragraph 85 of Count V of the Amended Complaint.

86. Smith denies the allegations contained in paragraph 86 of Count V of the Amended Complaint.

COUNT VI  
VIOLATION OF FALSE ADVERTISING STATUTE -  
MINN. STAT. 325F.67

87. Smith incorporates by reference its answers to paragraphs 1 through 86 as its answer to paragraph 87 of Count VI of the Amended Complaint.

88. Smith denies the allegations contained in paragraph 88 of Count VI of the Amended Complaint.

COUNT VII  
VIOLATION OF CONSUMER FRAUD ACT - MINN.  
STAT. 325F.68-70

89. Smith incorporates by reference its answers to paragraphs 1 through 88 as its answer to paragraph 89 of Count VII of the Amended Complaint.

90. Smith denies the allegations contained in paragraph 90 of Count VII of the Amended Complaint.



**COUNT VIII**  
**MISREPRESENTATION OF QUALITY - MINN. STAT.**  
**325D.13 ET SEQ.**

91. Smith incorporates by reference its answers to paragraphs 1 through 90 as its answer to paragraph 91 of Count VIII of the Amended Complaint.

92. Smith denies the allegations contained in paragraph 92 of Count VIII of the Amended Complaint.

**COUNT IX**  
**VIOLATION OF UNIFORM DECEPTIVE**  
**TRADE PRACTICES ACT**  
**MINN. STAT. 325D.44**

93. Smith incorporates by reference its answers to paragraphs 1 through 92 as its answer to paragraph 93 of Count IX of the Amended Complaint.

94. Smith denies the allegations contained in paragraph 94 of Count IX of the Amended Complaint.

95. Smith denies the allegations contained in paragraph 95 of Count IX of the Amended Complaint.

96. Smith denies the allegations contained in paragraph 96 of Count IX of the Amended Complaint.

97. Except as specifically admitted, qualified or otherwise answered herein, Smith denies each and every matter, allegation and averment contained in the Amended Complaint.

**AFFIRMATIVE DEFENSES**  
**FIRST AFFIRMATIVE DEFENSE**

Plaintiffs' Amended Complaint, and each purported claim alleged therein, fails to state a claim upon which relief may be granted.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiffs' Amended Complaint, and each purported claim alleged therein, is barred by the applicable statutes of limitation.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiffs' Amended Complaint, and each purported claim alleged therein, is barred by the doctrine of laches.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs' Amended Complaint, each purported claim alleged therein, is barred, in whole or in part, by plaintiffs' failure to mitigate damages.

**FIFTH AFFIRMATIVE DEFENSE**

Any damages incurred by plaintiffs were proximately caused by their own acts and/or omissions, thereby precluding or reducing any recovery of damages by plaintiffs.

#### SIXTH AFFIRMATIVE DEFENSE

The Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § § 1961 - 68) violates AOS' due process right protected by the Fifth and Fourteenth Amendments of the United States Constitution of Article 1, §7 of the Minnesota Constitution.

#### SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' Complaint, and each purported claim alleged therein, is barred by the doctrines of waiver and/or estoppel.

#### EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' Amended Complaint, to the extent it seeks punitive or exemplary damages, violates Minn. Stat. §549.121 and violates Smith's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and of Article 1, §7 of the Minnesota Constitution.

WHEREFORE, defendant A.O. Smith Corporation respectfully prays that the Court enter a judgment in its favor dismissing plaintiffs' Amended Complaint with prejudice and awarding to it its reasonable costs and attorneys fees and such other and further relief as the Court deems just and appropriate.

Dated: January 24, 1994 KATTEN MUCHIN & ZAVIS

By: /s/ David K. Schmitt

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(Affidavit of Service Omitted in Printing)

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Case No.: 4-93-822 (JMR)

Marvin Klehr and

Mary Klehr,

Plaintiffs,

vs.

A.O. Smith Corporation and  
A.O. Smith Harvestore Products,  
Inc., Jointly and Severally,

Defendants.

DEFENDANT A.O. SMITH HARVESTORE  
PRODUCTS, INC.'S ANSWER TO  
PLAINTIFFS' AMENDED COMPLAINT

Defendant A.O. Smith Harvestore Products, Inc.  
("AOSHPI"), for its answer to plaintiffs' Amended Complaint,  
states as follows:

1. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Amended Complaint and therefore denies those allegations.

2. AOSHPI admits that A.O. Smith Corporation ("A.O. Smith") is a Delaware corporation which manufactures a variety of products, supplies and services, including automobile frames and water heaters, and that until 1961, A.O. Smith researched, designed, patented, manufactured and marketed Harvestore silos. AOSHPI denies the remaining allegations in paragraph 2 of the Amended Complaint.

3. AOSHPI admits the allegations contained in paragraph 3 of the Amended Complaint, except that AOSHPI denies it was incorporated "by AOS."

4. AOSHPI admits that Minnesota Valley Breeders Association ("MVBA") is a Minnesota company doing business in the state of Minnesota and has been engaged in the business of selling, distributing, installing, assembling, servicing, repairing and modifying farm equipment and machinery, and denies the remaining allegations in paragraph 4 of the Amended Complaint.

5. AOSHPI admits that plaintiffs' Amended Complaint purports to assert an amount in controversy exceeding \$50,000, but denies that plaintiffs have stated a claim against AOSHPI exceeding that amount.

6. AOSHPI admits that plaintiffs purport to base jurisdiction upon 28 U.S.C. §§ 1331, 1332 and 1961, et seq.

7. AOSHPI admits that A.O. Smith sold Harvestore silos before 1961, that AOSHPI has sold Harvestore silos since 1961 and that the total number of Harvestore silos sold since 1949 is approximately 75,000.



AOSHPI denies the remaining allegations in paragraph 7 of the Amended Complaint.

8. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Amended Complaint, and therefore denies those allegations.

9. AOSHPI admits that the term "haylage" was first used in the 1940's and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 9 of the Complaint and therefore denies those allegations.

10. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of the Amended Complaint regarding what materials were provided to or received by plaintiffs; how, if or when such materials were provided to plaintiffs or received by plaintiffs; whether plaintiffs relied upon such materials; or what plaintiffs knew, believed, felt, judged, questioned, decided or did before, during or after receiving such materials. AOSHPI therefore denies those allegations. AOSHPI further states that the contents of the materials referred to in paragraph 10 of the Amended Complaint speak for themselves, and specifically denies that it made any false, misleading, fraudulent or intentionally confusing statements, representations, depictions, claims, comparisons, implications or omissions in those materials. AOSHPI admits that Harvestore Farmer magazine (later named Harvestore System Farming magazine) was published by AOSHPI and produced by Dave Brown & Associates, Chicago, Illinois. AOSHPI lacks knowledge or information sufficient to form a belief as

to the truth of the allegations that each issue of the Harvestore Farmer magazine was submitted to A.O. Smith for approval before publication and was transferred to Missouri where it was printed and mailed to farmers and dealers, and therefore denies those allegations.

AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations that defendants used the U.S. Mail to deliver advertising copy to Hoard's Dairyman with the expectation and knowledge that the magazine would be mailed to plaintiffs and other farmers similarly situated, and that all advertisements in the magazine were submitted to A.O. Smith for approval before being published. AOSHPI denies each and every remaining allegation contained in paragraph 10 of the Amended Complaint.

11. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the Amended Complaint regarding what visits or telephone calls were made to the plaintiffs by Richard Deutsch or what representations were made to the plaintiffs by Mr. Deutsch, oral or otherwise, and therefore denies the allegations in paragraph 11 of the Amended Complaint.

12. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 of the Amended Complaint and therefore denies those allegations.

13. Upon information and belief, admits that plaintiffs purchased a Harvestore silo from MVBA on or about July 15, 1974 and that the purchase order was

forwarded by MVBA to AOSHPI, and states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 13 of the Amended Complaint and therefore denies those allegations.

14. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the Amended Complaint and therefore denies those allegations.

15. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15 regarding what materials or magazines plaintiffs received through the U.S. Mail; how, when or if such materials were received by plaintiffs; what plaintiffs relied upon, believed, knew, understood, conceived, questioned, doubted, felt was important, realized, decided or did before, during or after they allegedly received the materials referred to in paragraph 15. AOSHPI therefore denies those allegations. AOSHPI states that the contents of the magazines, advertisements and articles referred to in paragraph 15 of the Amended Complaint speak for themselves, and specifically denies that they contain any false, misleading, fraudulent or intentionally confusing statements, representations, depictions, analogies, implications, lies or omissions. AOSHPI denies each and every remaining allegation contained in paragraph 15 of the Amended Complaint.

16. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 regarding what meetings or gatherings plaintiffs attended; what information, literature or films plaintiffs received at such gatherings or meetings or

through the U.S. Mail; how, when or if such information or materials were received by plaintiffs; or what plaintiffs believed, relied upon, understood, became convinced of, questioned, had faith in, knew, realized, decided or did before, during or after allegedly received the materials referred to in paragraph 16 of the Amended Complaint. AOSHPI accordingly denies those allegations. AOSHPI states that the contents of the magazines, advertisements, films and materials referred to in paragraph 16 of the Amended Complaint speak for themselves, and affirmatively denies that AOSHPI made false, misleading or fraudulent statements, representations, implications, depictions, suggestions or omissions. AOSHPI denies each and every remaining allegation in paragraph 16 of the Amended Complaint.

17. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17 of the Amended Complaint regarding what representations were made to the plaintiffs or what representations plaintiffs deemed to be material, and therefore denies those allegations. AOSHPI denies the remaining allegations contained in paragraph 17 of the Amended Complaint.

18. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Amended Complaint and therefore denies those allegations.

19. AOSHPI denies the allegations in paragraph 19 of the Amended Complaint.



20. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20 of the Amended Complaint regarding what plaintiffs relied upon, believed or deemed to be material, and therefore denies those allegations. AOSHPI denies the remaining allegations contained in paragraph 20 of the Amended Complaint.

21. AOSHPI denies the allegations in paragraph 21 of the Amended Complaint.

22. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the Amended Complaint and therefore denies those allegations.

23. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 23 of the Amended Complaint and therefore denies those allegations.

24. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the Amended Complaint and therefore denies those allegations.

25. AOSHPI denies the allegations of paragraph 25 of the Amended Complaint.

26. AOSHPI denies the allegations contained in paragraph 26 of the Amended Complaint

27. AOSHPI denies the allegations contained in paragraph 27 of the Amended Complaint.

AOSHPI further states that if, by this allegation, plaintiffs seek to allege a claim for punitive damages, their claim is premature and made in violation of MINN. STAT. § 549.191.

28. AOSHPI denies the allegations contained in paragraph 28 of the Amended Complaint.

29. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 29 of the Amended Complaint and therefore denies those allegations.

30. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30 of the Amended Complaint and therefore denies those allegations.

31. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 31 of the Amended Complaint, and therefore denies those allegations. AOSHPI denies the remaining allegations in paragraph 31 of the Amended Complaint.

32. AOSHPI incorporates by reference its answers to paragraphs 1 through 31 of the Amended Complaint as its answer to paragraph 32 of the Amended Complaint.

33. AOSHPI denies the allegations of paragraph 33 of the Amended Complaint.



34. AOSHPI denies the allegations contained in paragraph 34 of the Amended Complaint.

35. AOSHPI admits it provided sales training to independent Harvestore dealers from time to time and that MVBA could choose to participate in such training at its own cost, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 35 of the Amended Complaint and therefore denies those allegations.

36. AOSHPI denies the allegations in paragraph 36 of the Amended Complaint.

37. AOSHPI denies that it instructed MVBA salesmen regarding what representations to make to prospective purchasers, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 37 of the Amended Complaint and therefore denies those allegations.

38. AOSHPI admits it made sales literature regarding Harvestore silos available to its independent dealers to purchase for their own use, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 38 of the Amended Complaint and therefore denies those allegations.

39. AOSHPI denies the allegations in paragraph 39 of the Amended Complaint.

40. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations

contained in paragraph 40 of the Amended Complaint and therefore denies those allegations.

41. AOSHPI admits that it intended for its sales literature and promotional materials to be received by farmers, if its independent dealers chose to provide such information to those farmers, and denies the remaining allegations in paragraph 41 of the Amended Complaint.

42. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 42 of the Amended Complaint and therefore denies those allegations.

43. AOSHPI denies the allegations in paragraph 43 of the Amended Complaint.

44. AOSHPI denies the allegations in paragraph 44 of the Amended Complaint.

45. AOSHPI denies the allegations in paragraph 45 of the Amended Complaint.

46. AOSHPI denies the allegations contained in paragraph 46 of the Amended Complaint.

47. AOSHPI denies it made false representations, and states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 47 of the Amended Complaint and therefore denies those allegations.

48. AOSHPI denies the allegations contained in paragraph 48 of the Amended Complaint.

49. AOSHPI denies the allegations contained in paragraph 49 of the Amended Complaint. AOSHPI further states that if, by this allegation, plaintiffs seek to allege a claim for punitive damages, their claim is premature and made in violation of MINN. STAT. § 549.191.

50. AOSHPI incorporates by reference its answers and responses to paragraphs 1 through 49 of the Amended Complaint as its Answer to paragraph 50 of the Amended Complaint.

51. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 51 of the Amended Complaint, and therefore denies those allegations.

52. AOSHPI admits that A.O. Smith, from time-to-time, rendered certain research and development services and was engaged in the distribution of replacement parts for AOSHPI, for which AOSHPI was charged by A.O. Smith, and denies the remaining allegations in paragraph 52 of the Amended Complaint.

53. AOSHPI admits that, from time-to-time, it retained the legal services of the A.O. Smith law department, for which services AOSHPI was charged by A.O. Smith, but lacks information or knowledge sufficient to form a belief as to the truth of the allegations as to whether the A.O. Smith law department reviewed any Harvestore sales training materials, all sales literature and all films made available by

AOSHPI to its independent dealers and therefore denies those allegations. AOSHPI admits A.O. Smith provided it with some printing and distribution services from time-to-time, for which AOSHPI was charged by A.O. Smith. AOSHPI lacks knowledge or information sufficient to form a belief as to what materials were furnished to the plaintiffs, and therefore denies those allegations. AOSHPI denies the remaining allegations in paragraph 53 of the Amended Complaint.

54. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 54 of the Amended Complaint as to whether the A.O. Smith law department approved the content of any sales training materials, all sales literature, all films and all magazines regarding the Harvestore structure and how it operated, and as to what representations were made to the plaintiffs and were material to their decision to purchase the Harvestore silo as well as the continued use, operation, maintenance and repair of the silo, and therefore denies those allegations. AOSHPI denies the remaining allegations in paragraph 54 of the Amended Complaint.

55. AOSHPI denies the allegations of paragraph 55 of the Amended Complaint.

56. AOSHPI denies the allegations of paragraph 56 of the Amended Complaint.

57. AOSHPI denies the allegations of paragraph 57 of the Amended Complaint.

58. AOSHPI denies the allegations in paragraph 58 of the Amended Complaint.



59. AOSHPI denies that false representations were made to the plaintiffs through AOSHPI and states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 59 of the Amended Complaint and therefore denies those allegations.

60. AOSHPI denies the allegations of paragraph 60 of the Amended Complaint.

61. AOSHPI denies the allegations of paragraph 61 of the Amended Complaint. AOSHPI further states that if, by this allegation, plaintiffs seek to allege a claim for punitive damages, their claim is premature and made in violation of MINN. STAT. § 549.191.

62. AOSHPI incorporates by reference its answers and responses to paragraphs 1 through 61 of the Amended Complaint as its Answer to paragraph 62 of the Amended Complaint.

63. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 63 of the Amended Complaint regarding the representations made to the plaintiffs prior to or after the sale of Harvestore silo, and whether AOSHPI or A.O. Smith used the mails or caused the mails to be used in connection with representations made to the plaintiffs prior to or after the sale of the Harvestore silo, and therefore denies those allegations. AOSHPI admits that it used the mails in the ordinary course of business to conduct its ordinary business activities, but specifically denies that it used the mails for any fraudulent or illegal purpose or to convey fraudulent, illegal or misleading information. AOSHPI states that the contents of

the various advertising, literature, and other materials speak for themselves, and specifically denies that they contain any false, misleading, fraudulent or intentionally confusing statements, representations, implications, depictions, information or omissions. AOSHPI denies each and every remaining allegation contained in paragraph 63 of the Amended Complaint.

64. AOSHPI denies the allegations contained in paragraph 64 of the Amended Complaint.

65. AOSHPI denies the allegations contained in paragraph 65 of the Amended Complaint.

66. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66 of the Amended Complaint regarding representations made to the plaintiffs prior to or after the sale of the Harvestore silo, and whether AOSHPI or A.O. Smith used interstate telephone lines or caused the interstate telephone lines to be used in connection with representations made to the plaintiffs prior to or after the sale of the Harvestore silos, and therefore denies those allegations. AOSHPI admits it used interstate telephone lines in the ordinary course of its business for ordinary business activities and denies that such use was in furtherance of a scheme to defraud plaintiffs or others or to convey fraudulent, illegal or misleading information. AOSHPI lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 66 of the Amended Complaint and therefore denies those allegations.



67. AOSHPI denies the allegations in paragraph 67 of the Amended Complaint.

68. AOSHPI denies the allegations in paragraph 68 of the Amended Complaint.

69. AOSHPI denies the allegations in paragraph 69 of the Amended Complaint.

70. AOSHPI denies the allegations in paragraph 70 of the Amended Complaint.

71. AOSHPI denies the allegations in paragraph 71 of the Amended Complaint.

72. AOSHPI denies the allegations in paragraph 72 of the Amended Complaint.

73. AOSHPI denies the allegations in paragraph 73 of the Amended Complaint.

74. AOSHPI denies the allegations in paragraph 74 of the Amended Complaint.

75. AOSHPI denies the allegations in paragraph 75 of the Amended Complaint.

76. AOSHPI incorporates by reference its answers and responses to paragraphs 1 through 75 of the Amended Complaint as its answer to paragraph 76 of the Amended Complaint.

77. AOSHPI denies the allegations contained in paragraph 77 of the Amended Complaint.

78. AOSHPI denies the allegations contained in paragraph 78 of the Amended Complaint.

79. AOSHPI denies the allegations in paragraph 79 of the Amended Complaint.

80. AOSHPI denies the allegations in paragraph 80 of the Amended Complaint.

81. AOSHPI denies the allegations in paragraph 81 of the Amended Complaint.

82. AOSHPI denies the allegations in paragraph 82 of the Amended Complaint.

83. AOSHPI incorporates by reference its answers and responses to paragraphs 1 through 82 of the Amended Complaint as its answer to paragraph 83 of the Amended Complaint.

84. AOSHPI incorporates its answers to paragraphs 1 through 82 as its answer to paragraph 84 of the Amended Complaint and specifically denies that its conduct was negligent or intentional.

85. AOSHPI denies the allegations in paragraph 85 of the Amended Complaint.

86. AOSHPI denies the allegations in paragraph 86 of the Amended Complaint.

87. AOSHPI incorporates by reference its answers to paragraphs 1 through 86 of the Amended Complaint as its answer to paragraph 87 of the Amended Complaint.

88. AOSHPI denies the allegations contained in paragraph 88 of the Amended Complaint.

89. AOSHPI incorporates by reference its answers to paragraphs 1 through 88 of the Amended Complaint as its answer to paragraph 89 of the Amended Complaint.

90. AOSHPI denies the allegations in paragraph 90 of the Amended Complaint.

91. AOSHPI incorporates by reference its answers to paragraphs 1 through 90 of the Amended Complaint as its answer to paragraph 91 of the Amended Complaint.

92. AOSHPI denies the allegations in paragraph 92 of the Amended Complaint.

93. AOSHPI incorporates by reference its answers to paragraphs 1 through 92 of the Amended Complaint as its answer to paragraph 93 of the Amended Complaint.

94. AOSHPI denies the allegations in paragraph 94 of the Amended Complaint.

95. AOSHPI denies the allegations in paragraph 95 of the Amended Complaint.

96. AOSHPI denies the allegations in paragraph 96 of the Amended Complaint.

97. Except as specifically admitted, qualified or otherwise answered herein, AOSHPI denies each and every allegation, statement or averment contained in the Amended Complaint.

#### AFFIRMATIVE DEFENSES

1. AOSHPI affirmatively alleges that plaintiffs' Complaint fails to state a claim against it upon which relief may be granted.

2. AOSHPI affirmatively alleges that any damages suffered by the plaintiffs were caused or contributed to, in whole or in part, by persons for whom AOSHPI had no legal responsibility and over whom it exercised no control.

3. AOSHPI affirmatively alleges that any damages suffered by the plaintiffs were caused or contributed to, in whole or in part, by plaintiffs' own negligence, contributory fault or assumption of risk.

4. AOSHPI affirmatively alleges that plaintiffs' causes of action are barred, in whole or in part, by the applicable statutes of limitations.

5. AOSHPI affirmatively alleges that plaintiffs' causes of action are barred, in whole or in part, by the doctrine of laches.

6. AOSHPI affirmatively alleges that plaintiffs have waived their causes of action and/or are estopped from pursuing their causes of action by reason of waiver, release,

and the disclaimer language contained in their purchase contract.

7. AOSHPI affirmatively alleges that plaintiffs' causes of action are barred, in whole or in part, by plaintiffs' failure to mitigate their damages.

8. Plaintiffs claims under the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§ 1961-68) violates AOSHPI's due process rights protected by the 5th and 14th Amendments of the United States Constitution and Article I, Section 7, of the Minnesota Constitution.

WHEREFORE, defendant A.O. Smith Harvestore Products, Inc. respectfully requests that the Court enter judgment in its favor dismissing plaintiffs' Amended Complaint on the merits and with prejudice, and award AOSHPI its costs and disbursements herein, along with any other relief the Court deems just and equitable.

Dated: January 25, 1994

/s/ Blake Shepard

Frederick W. Morris

Atty I.D. No. 75358

Blake Shepard, Jr.

Atty I.D. No. 161536

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ATTORNEYS FOR

DEFENDANT A.O. SMITH

HARVESTORE PRODUCTS, INC.

(Affidavit of Service Omitted in Printing)



UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Case No.: 4-93-822 (JMR)  
Magistrate Franklin Noel

Marvin Klehr and  
Mary Klehr,

Plaintiffs,

v.

A.O. Smith Corporation and  
A.O. Smith Harvestore Products,  
Inc., Jointly and Severally,

Defendants.

RICO CASE STATEMENT OF  
MARVIN AND MARY KLEHR

Plaintiffs Marvin and Mary Klehr, by their attorneys, Charles A. Bird, 300 Third Avenue SE, Suite 305, Rochester, Minnesota; James Anthony Vick and Malcolm McCune, 300 James Robertson Parkway, Nashville, Tennessee; James Koby, 205 Fifth Avenue South, Suite 600, LaCrosse, Wisconsin, and William Mahler, 300 Third Avenue SE, Suite 301, Rochester, Minnesota, submit this RICO case statement in compliance with the Court's Order of January 24, 1994. As suggested by the court at the Motion hearing on January 24, 1994, Plaintiffs have, where practicable, cited to the Amended Complaint in responding to the questions of the court.

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§1962(a), (b), (c), and/or (d).

Plaintiffs' Response:

The unlawful conduct of A.O. Smith Corporation ("AOS") and A.O. Smith Harvestore Products, Inc. ("AOSHPI") is in violation of 18 U.S.C. §§1962(a), and (c).

2. List each Defendant and state the alleged misconduct and basis of liability of each Defendant.

Plaintiffs' Response:

Defendants in this matter are AOS and AOSHPI. Plaintiffs have pleaded claims against each Defendant sounding in common law fraud, statutory fraud and misrepresentation, violation of 18 U.S.C. §1962(c) and violation of 18 U.S.C. §1962(a). Plaintiffs may seek to amend their pleading to allege a violation of §1962(d).

The gravamen of Plaintiffs' claim is that AOS and AOSHPI, formed an association-in-fact for the purposes of manufacturing, marketing, and selling farm equipment (see Plaintiffs' response to Question 8) to farmers across the United States, including the Plaintiffs. This "association in fact" has been plead in the alternative, as consisting of (1) AOS, AOSHPI and MVBA either alone or acting as part of Defendants Dealer Organization or (2) MVBA, either alone or acting as part of the Defendants "Dealer Organization". See Amended Complaint ¶s 4, 71, and 72.

Among the farm equipment sold by the association in fact was the "Harvestore" brand silo. AOS created and developed the "Harvestore" concept in approximately 1949 and marketed the silos through its dealer organization until 1961 when it formed AOSHPI as a wholly-owned subsidiary. At that time, AOS and AOSHPI began to share the task of marketing Harvestore silos, acting in combination and concert. Amended Complaint, ¶ 2. From the creation of the Harvestore system in 1949 up until at least 1989, AOS and from 1961 AOS and AOSHPI, acting in combination and concert, aggressively and fraudulently marketed the silos as "oxygen-free" and/or "oxygen limiting."<sup>1</sup>

Through a scheme utilizing the United States mails, interstate wires and other means, AOS and AOSHPI, acting in combination and concert, falsely represented to farmers across the United States, including the Plaintiffs, that Harvestore silos would exclude oxygen from ensiled feeds stored within. AOSHPI and AOS falsely represented to the farmers, including the Plaintiffs, that the "oxygen limiting" nature of the Harvestore system would properly preserve the feed as though it were stored in a fruit jar, free from the access of oxygen.

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<sup>1</sup> Although the terms suggest a difference, proofs at trial will demonstrate that AOS and AOSHPI defined the term "oxygen limiting" as a system which "prevents oxygen from coming into contact with the stored feed." Hence, "oxygen limiting" means "oxygen-free" in the parlance of Defendants. This issue is addressed in Lollar v. AOSHPI, 795 S.W.2d 441, 444 (MO App. 1990) (Attached as Exhibit A).

Notwithstanding the representations, AOS and AOSHPI had each conducted numerous and detailed studies during the period the Harvestores were being marketed and sold (1954-1982), which demonstrated that the silos were not "oxygen limiting" but were in fact oxygen-enhancing, and had other serious design flaws, thus promoting the deterioration of feeds stored within it. See Amended Complaint ¶ 26. Despite possessing detailed knowledge that its "oxygen limiting" and related representations were false, AOS and AOSHPI, acting together, through a scheme utilizing the mails and interstate wires, continued to make those representations to farmers across America, including the Plaintiffs, in what AOSHPI (with the express approval of co-conspirator AOS), proclaimed to be one of the most comprehensive mass marketing efforts in agri-business. See "Blue Chip Opportunity", p. 14. (Attached as Exhibit B.) Proceeds from the sale of Harvestore silos accomplished through this fraudulent scheme were invested by AOSHPI and AOS directly into the association-in-fact enterprise in order to (A) fund the continuing marketing and sale of Harvestore structures as "oxygen limiting" as that term is defined and used by Defendants feed storage structures, (B) funded post-sale misrepresentations to Plaintiffs and other farmers, including, but not limited to magazines, movies, and other literature, (C) funded efforts to conceal known product defects from Plaintiffs, other farmers similarly situated, MVBA and other Harvestore dealers, and (D) funded Agristor Credit Corporation, a separate, wholly owned subsidiary of AOS, whose sole business is the financing of the sale or lease of AOSHPI products (both to the farmer and to members of the Dealer Organization), the profits of which inure solely to the benefit of AOS.



3. List the alleged wrongdoers, other than the Defendants listed above, and state the alleged misconduct of each wrongdoer.

Plaintiffs' Response:

Plaintiffs are unaware whether other parties involved in the manufacture and marketing of Harvestore silos participated in the fraud of AOS and AOSHPI, or whether they were "wrongdoers" within the intended meaning of Question 3. Although Harvestore dealers such as MVBA and salesman such as Richard Deutsch repeated false representations authored by AOS and AOSHPI (and may have been negligent in doing this), Plaintiffs do not allege the dealers or individual salesmen shared AOS and AOSHPI's knowledge that the representations were false or that they are "wrongdoers" within the intended meaning of Question 3.

4. List the alleged victims and state how each victim was allegedly injured.

Plaintiffs' Response:

Victims of AOS' and AOSHPI's racketeering activity include, but are not limited to the following parties. To show the Court the widespread nature of the fraud, and its effect on interstate commerce, some of the victims are grouped by farm, with their geographic location identified:

Minnesota:

- i. Michael Guggisberg and Jean Guggisberg (Minnesota);

- ii. Raymond and Larry Kronebusch (Altura, Minnesota);  
 iii. Martin Tesch (Waldorf, Minnesota);  
 iv. Marvin Klehr and Mary Klehr (Shakopee, Minnesota);  
 v. Russ and Elaine Parker (Elgin, Minnesota);  
 vi. David and Lynne Kappahn (Bertha, Minnesota);  
 vii. Charles Hansen (Canby, Minnesota);  
 viii. Yonker-Nelson Farms (Nobles County, Minnesota);

Colorado:

- ix. Robert W. Korf and Minnie Korf (Colorado);  
 x. Raymond and Joyce Boyd (Morgan County, Colorado);  
 xi. Alfred and Martha Keller (Colorado);  
 xii. Richard and Carol Kallsen (Colorado);

Florida:

- xiii. Suber Cattle Company (Florida);

Georgia:

- xiv. Tommy Jordan (Georgia);

Idaho:

- xv. Burdette and Charlotte Branscum (Bonners Ferry, Idaho);

Indiana:

- xvi. Warren and Francille Colglazier, (Mitchell, Indiana);  
 xvii. Bennett F. Olsson and Janet Lou Olsson, Circle J Dairy, Inc. (Indiana);



Iowa:

- xviii. Darrel and Donna Souhrada (Cresco, Iowa);

Michigan:

- xix. John Gross and Norma Gross (Genesee County, Michigan);  
xx. Greg Mohr, Barbara Mohr and Walter Mohr, Mohrland Farms (Mayville, Michigan);  
xxi. Dale H. Myers, Ila Myers and Allen D. Myers (Brown City, Michigan);  
xxii. Arthur Thiss and Molly Thiss (Coopersville, Michigan);  
xxiii. Reginald VanSickle and Merle VanSickle, West Marion Dairy (Deckerville, Michigan);

Missouri:

- xxiv. Wade Lollar (Missouri);

Nebraska:

- xxv. Gary C. Frerichs and Diane L. Frerichs (Nebraska);  
xxvi. Roland Anderson (Nebraska);

New York:

- xxvii. Norman and Gladys Ashland (Watertown, New York);  
xxviii. Eugene Barber and Art and Alice Walters (Casenovia, New York);  
xxix. Tom Trinder (New York);

North Dakota:

- xxx. Norman and Darlene Stein (Mandan, North Dakota);  
xxxi. Edward and Belle Krank (Morton County, North Dakota);

South Dakota:

- xxxii. Ronald and Geraldine Scharffenberg (Bridgewater, South Dakota);

Tennessee:

- xxxiii. Frey Dairy (Tennessee);  
xxxiv. James Saylor and Kaaren Saylor (Bedford County, Tennessee);  
xxxv. William Dayon Taylor (Tennessee);  
xxxvi. Brooks Farms (Maury County, Tennessee);  
xxxvii. Ed and Charles Taylor (Lincoln County, Tennessee);  
xxxix. Warner Ross (Toone, Tennessee);  
xl. Joe and Wilma Wagner (College Grove, Tennessee);  
xli. David and Wayne Hill--Hill Bros Dairy (Lincoln County, Tennessee);

Texas:

- xlii. S.W. Applewhite II (Texas);

Wisconsin:

- xliii. John and Barb Chitwood (Blue River, Wisconsin);  
xliv. Achiel and Anitta D'Huyvetter (Neillsville, Wisconsin);  
xlv. Steven and Susan Pluemer (Potosi, Wisconsin).

Through schemes of mail and wire fraud AOS and AOSHPI disseminated to each of the victims representations that the Harvestore silo was "oxygen limiting." Each victim was injured by paying substantial sums to purchase or lease a Harvestore silo based upon this representation, which was false. The specific injuries suffered by each victim to their

livestock operation, in addition to the purchase price, resulted from feeding the oxygen and heat-damaged ensiled feed to their livestock. There was a loss of feed and farm production in every case. Plaintiffs' damages are discussed in greater detail in response to ¶15, *infra*.

**5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering shall include the following information:**

- a. List the alleged predicate acts and the specific statutes which were allegedly violated;**

Plaintiffs' Response:

- i. Mail fraud in violation of 18 U.S.C. §1341;
  - ii. Wire fraud in violation of 18 U.S.C. §1343.
- b. Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;**

Plaintiffs' Response:

Plaintiffs are unsure of the meaning which the court gives to the phrase "participants in the predicate acts." Those liable for commission of the predicate acts are AOS and AOSHPI.

A description of AOS and AOSHPI's fraudulent scheme is found in Plaintiffs' Response to ¶2, *supra*.

Mail Fraud. Plaintiffs are unable to attach precise dates to all of AOS' and AOSHPI's use of the mails for the purpose of executing their fraudulent scheme. Their use of the mails included, however, the specific acts listed in the Amended Complaint at ¶s 10, 15, 16, and 63 and also included the following:

- i. Distribution to farmers of "Harvestore System Farming" (nee "Harvestore Farmer"), a magazine that contained the fraudulent "oxygen limiting" representation or was used in executing the scheme that led to presentation of this fraudulent representation on at least five occasions each year since at least 1979. See Dealer Management Guide 430.1, Exhibit F. AOSHPI admits that Harvestore Systems Farming was mailed five times a year to more than 200,000 customers, prospects, and individuals influential in local farming communities across the country. (Exhibit B, p. 14.) Plaintiffs, and the other victims identified under Question 4, were among the over

200,000 recipients of these fraudulent mailings.

- ii. Transmittal of information by AOSHPI to Dave Brown & Associates (AOSHPI public relations agency and publisher of Harvestore Systems Farming magazine) on one or more occasion each year from at least 1972- 1986. This information was included in the Harvestore Farmer and/or Harvestore Systems Farming magazine and contained the fraudulent "oxygen limiting" representation or was used to execute the scheme that led to dissemination of that representation.
- iii. Transmittal of sales literature and/or sales aids (including films) between AOSHPI and authorized Harvestore system dealers, including MVBA, that contained the fraudulent "oxygen limiting" representation or was used in executing the scheme that led to presentation of this fraudulent representation on at least one occasion in each year from 1970 - 1990.
- iv. Transmittal of sale literature and proposed sales literature containing the fraudulent "oxygen limiting" representation between AOS and AOSHPI on one or more occasion each year for the years 1970 through 1990 (AOS' corporate policy required AOS

review and approval of all AOSHPI promotional materials). Transmittal of these materials by mail for review by AOS was integral to the execution of the fraudulent scheme.

- v. Dissemination by both AOS and AOSHPI of coupons to farmers throughout the country, from at least 1961 through 1989, which caused farmers to fill them out and mail them to AOS and/or AOSHPI so that AOS and/or AOSHPI could mail the farmers promotional literature (including literature containing fraudulent representations), or dispatch an AOSHPI-trained salesman. An example of such a coupon is attached to this submission as Exhibit C. Plaintiffs believe AOSHPI will admit receiving one or more of these coupons through the mails in every year from 1972 to 1989. See, also, Amended Complaint ¶s 10, 15, 16, and 63.
- vi. Distribution through the use of the mails of dealer training manuals to authorized Harvestore system dealers, including MVBA. Dealer Management Guide 610.1, Exhibit F.
- vii. Dissemination of interoffice memoranda between AOS and AOSHPI in furtherance of the fraudulent scheme. An example of such a memorandum is attached to this



submission as Exhibit D. See also ¶26 Amended Complaint.

- viii. Dissemination of research and development reports between AOSHPI and AOS in furtherance of the fraudulent scheme. An example of such a report is attached to this submission as Exhibit E. See also ¶26 Amended Complaint.
- ix. Transmittal of information relating to the securing of patents related to the Harvestore structures at least once each year from 1972 through 1986 by AOSHPI, and at least once per year from 1951-1960 by AOS.
- x. Receipt through the mail of Harvestore order forms each year from 1970- 1990. Dealer Management Guide 751.10, Exhibit F. AOS distributed the order forms to dealers by mail. Dealers mailed computer order forms to AOSHPI. D.M. Guide 710.1, Exhibit F.
- xi. Distribution through the mails of information including the fraudulent representations to Creswell, Munsell, Fultz and Zirbel, Inc. ("CMF&Z"), that was used to create Harvestore advertising containing the fraudulent representations, at least once each year from 1977-1981.

- xii. Distribution through the mails of information including the fraudulent representations to Miller Meester Advertising, Inc., that was used to create Harvestore advertising containing the fraudulent representations, at least once each year from 1981 and thereafter.

- xiii. Maintenance of an Electronic Mailing System for the express purpose of mailing advertising and other materials, which items contained false representations. D.M. Guide 440.1, attached as Exhibit F.

Wire Fraud. Plaintiffs' wire fraud allegations are based upon the use of interstate telephone lines. Plaintiffs are unable to identify each date AOS and AOSHPI used or caused the telephone lines to be used in furtherance of their fraudulent scheme. Each wire transmission related to information used to further the dissemination of fraudulent representations to Plaintiffs and other farmers throughout the country regarding the "oxygen limiting" capabilities of the Harvestore system, to disseminate information that established the falsity of those representations and AOS' and AOSHPI's intimate knowledge of that falsity, or to make other communications integral to execution of the fraudulent scheme. Specific uses of telephone lines presently known to the Plaintiffs include:

- i. Use of telephone lines by MVBA and other Harvestore dealers, solicited by AOSHPI, to use either telephone or telefax for ordering Harvestore silos from AOSHPI. D.M. Guide 730.1, Exhibit F.

- ii. Use of telephone lines by AOSHPI and MVBA to schedule shipment dates for Harvestore silos;
- iii. See also ¶66 Amended Complaint;
- iv. Use of the telephone lines to order from A.O. Smith Corporation (PSD) the Harvestore System Sales Training Kit and Harvestore System Training Coordinator's Guide; which contain the false "oxygen limiting" representation. (See DM Guide 610.1) and Order forms for silos. (See D.M. Guide 751.1), Exhibit F.

c. **If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Identify the time, place and contents of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;**

Plaintiffs' Response:

Fraudulent representations regarding the "oxygen limiting" qualities of Harvestore silos reached the Plaintiffs in several ways: through direct, oral statements by AOSHPI-trained salespersons Ben Johannes and Richard Deutsch, through AOSHPI-authored and AOS-approved promotional

literature, and through AOSHPI-produced and AOS-approved promotional films.

Each representation was that Harvestore silos were "oxygen limiting" and would protect ensiled feeds from contact with oxygen, and that this "oxygen limiting" feature would provide collateral benefits, including but not limited to better feed preservation, better feed quality, and more palatable feed.

Oral representations were received from AOSHPI-trained salesperson Richard Deutsch on an ongoing basis from July 1973 until July 15, 1974, when the Plaintiffs purchased their Harvestore system. Oral representations were made during 6-8 personal visits to the Plaintiffs' farm and during "farm tours" —tours led by Richard Deutsch of farms which had Harvestore silos. See also ¶11 Amended Complaint.

The specific films, promotional literature, and advertisements which Plaintiffs saw and relied upon before the sale are described with particularity at ¶10 Amended Complaint. The films promotional materials and advertisements relied upon after the sale are described with particularity at ¶s 15 and 16 Amended Complaint. Other fraudulent information moving in the mails and by interstate wires, not relied upon by Plaintiffs, but relied upon by other victims, is set out at ¶s 63 and 66, Amended Complaint.

Some of the literature was received through the mail and some was delivered by hand by Richard Deutsch. Identical or substantially similar literature was furnished to each of the victims identified in ¶4, supra.



- d. State whether there has been a criminal conviction for violation of the predicate acts;

Plaintiffs' Response:

Plaintiffs are unaware of any criminal convictions for violations of predicate acts. AOS and/or AOSHPI may be aware of such convictions.

- e. State whether civil litigation has resulted in a judgment in regard to the predicate acts;

Plaintiffs' Response:

Plaintiff is unaware of civil judgments in regard to mail or wire fraud, but a number of victims identified in ¶4, supra, have obtained civil fraud judgments against AOSHPI based on the identical fraudulent "oxygen limiting" representation which in almost every instance were disseminated through the use of the mails. Included among the victims securing a judgment were the following:

- i. First National Bank of Louisville v. Brooks Farms, 821 S.W.2d 264 (TN 1991);
- ii. Keller v. A.O. Smith Harvestore Products, 819 P.2d 69 (Colo. 1991);
- iii. Korf v. A.O. Smith Harvestore Products, Inc., 917 F.2d 480 (10th Cir. 1990);

- iv. Kappahn v. A.O. Smith Corp. et al., Carver Co. Minnesota District Court, File #85-20280;

- v. Lollar v. A.O. Smith Harvestore Products, Inc., 795 S.W.2d 441 (MO App. 1990);

- vi. Olsson v. A.O. Smith Harvestore Products, Inc., 656 F.Supp. 644 (SD Ind. 1987);

- vii. Agristor Leasing v. Saylor, 803 F.2d 1401 (6th Cir. 1986) retried and appealed at Saylor v AOSHPI, 872 F.2d 1028;

- viii. Agristor Leasing (v. Taylor) v. A.O. Smith Harvestore Products, Inc., 869 F.2d 264, 268 (6th Cir. 1989);

- ix. Kronebusch et al v. A.O. Smith Harvestore Products, Inc., 488 N.W.2d 490 (1992);

- x. Souhrada et al v. A.O. Smith Harvestore Products, Inc., unpublished, on appeal (1990);

- xi. Buller v. AOSHPI, MN Court Appeals, unpublished decision, October 13, 1993, (Petition for Review granted) attached as Exhibit G.;



- xii. Dubbe v. AOSHPI, 399 N.W.2d 644, 646 (MN App. 1987). (Fraud found but no cause on damages.)

Numerous other cases have been settled for substantial sums, the specific amounts of such settlements, at the insistence of Defendants, cannot be disclosed and must be kept confidential.

- f. **Describe how the predicate acts form a "pattern of racketeering activity";**

Plaintiffs' Response:

The predicate acts described in response to Question 5(b) revolve around a common plan by Defendants to perpetrate a fraud upon the nation's farming industry on a continual basis from at least 1954 to 1991, utilizing the wholly false representation that a Harvestore silo is "oxygen limiting." Each of the delineated predicate acts are related to achieving the result of the fraudulent scheme or common plan -- sale of Harvestore silos based on its highly touted ability to prevent oxygen from contacting the feed stored within it.

These predicate acts touch almost every aspect of the process leading up to consummating the sale of a Harvestore silo, including design, manufacturing, marketing, and processing the sales order. More than 77,000 silos have been sold. As important, the predicate acts are not isolated by time or geography. These predicate acts, numbering in the thousands, have been committed on a continual basis utilizing the same methodology over a period spanning at least 37 years and similarly affected a single group of victims -- the farming

industry of America. AOSHPI (with the approval of AOS) employs and instructs authorized dealers and salesman in a five step sales process which results in consummation of the fraud. Exhibit B, p. 12. The sales training materials are ordered from AOS through the mails. D.M. Guide 610.1, Exhibit F.

In short, the length over which this fraudulent pattern of activity has extended, coupled with its common plan, design, methods of commission, results to the farmers and victims, is sufficient to bring it within the purview of Title IX.

- g. **State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.**

Plaintiffs' Response:

Yes. AOS and AOSHPI planned to sell Harvestore silos to as many American farmers as possible, using the fraudulent "oxygen limiting" representation as part of "one of the most comprehensive marketing programs in all of agri-business." See Plaintiffs' responses to ¶s 2, 3, and 5(f), and Exhibit B, pp. 2, 8, 10, 12, 13, and 14.

6. **Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:**
- a. **State the names of the individuals, partnerships, corporations, associations, or other legal entities,**

which allegedly constitute the enterprise;

Plaintiffs' Response:

The enterprise consists of an association-in-fact between AOS, AOSHPI and MVBA (acting alone or as part of Defendants Dealer Organization) or alternatively, MVBA, acting alone, or as part of Defendants "Dealer Organization." See Amended Complaint ¶s 4, 71, and 72.

- b. Describe the structure, purpose, function and course of conduct of the enterprise;

Plaintiffs' Response:

As an association-in-fact, the enterprise had no distinct legal identity or formalized "function" or structure." Its purpose and course of conduct was to manufacture, market and sell farm equipment, including Harvestore brand silos, "Slurrystore" Manure Processing Systems, The Harvestore Wa-Ro-Matic, various types of augers, grain weighers, roller mills, mineral meters, supplement meters, flight conveyors, belt conveyors, electronic scales, belt feeders, Super Shuttle I & II, cycling feeders, Rotary Hog Feeder, various types of pumps, Slurrystore spreaders, control centers, feed bunk floors, standby alternators, grain reconstituters and grinder-blowers. MVBA also was involved in the lawful sale of semen for breeding livestock.

AOS, founded well over a century ago, has been in the agricultural equipment business for decades, but had legitimate business as well. Amended Complaint ¶2. AOS conceived of the "dealer network" aka "dealer organization" which was a predecessor of and led directly to the association-in-fact enterprise. See Amended Complaint ¶s 4, 10(b)(1), 11(f), 15, 15(q), 15(s), 15(w), 15(bb), 16(e), 16(g), 16(i), 26 (at p. 27 Amended Complaint), 39, 44, 56, 63(f)(36), 71, and 72. Following AOS' incorporation of AOSHPI in 1961, AOS transferred much operational responsibility for agricultural equipment to AOSHPI. AOS, however, maintained critical roles in the enterprise. As a matter of fact, among other things, AOS reviewed and approved all AOSHPI's promotional material (including material containing fraudulent representations).

AOSHPI, at some point following its incorporation, assumed responsibility for manufacturing the silos and for maintenance and improvement of the already-existing dealer distribution network. With the help of AOS, AOSHPI further developed the "comprehensive marketing program" of which it later would boast. AOS and AOSHPI developed the direct mail program together and shared responsibilities for that program. AOSHPI trained dealer salespersons, including salespersons employed by MVBA.

MVBA was the member of the enterprise responsible for most face-to-face contact with prospective farm equipment purchasers, and was responsible for "closing" sales. Its AOSHPI trained salespersons were well-versed in AOS/AOSHPI promotional materials and programs.



- c. **State whether any Defendants are employees, officers or directors of the alleged enterprise;**

Plaintiffs' Response:

No.

- d. **State whether any Defendants are associated with the alleged enterprise;**

Plaintiffs' Response:

Plaintiffs assume the Court used the term "associated with" in the manner it is used in 18 U.S.C. §1962. In that context, Plaintiffs answer "yes." Plaintiffs invite the Court to clarify the meaning of the phrase "associated with" if Plaintiffs have not adequately addressed the Court's concerns with regard to ¶6(d).

- e. **State whether you are alleging that the Defendants are individuals or entities separate from the alleged enterprise, or that the Defendants are the enterprise itself, or members of the enterprise;**

Plaintiffs' Response:

Plaintiffs allege the Defendants are separate from the RICO enterprise. Plaintiffs are unsure of the meaning the Court gives to the phrase, "members of the enterprise." Again, the enterprise is, as alleged in the alternative, an

association-in-fact of AOS, AOSHPI and MVBA, and, to that extent, Defendants are "members" of the enterprise.

- f. **If any Defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such Defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.**

Plaintiffs' Response:

Again, Plaintiffs are unsure of the meaning of the phrase, "members of the enterprise."

Plaintiffs allege Defendants are the perpetrators of the racketeering activity, using MVBA, the Dealer Organization and the enterprise itself as the conduit, or "passive instrument" of this activity. Plaintiffs do not allege Defendants are the enterprise.

7. **State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.**

Plaintiffs' Response:

Plaintiffs do not allege that the "pattern of racketeering activity" has merged with the "enterprise" into a single entity,



and allege the enterprise is distinct from the pattern. Plaintiffs are unsure of the Court's intent in ¶7 and do not understand conceptually how a pattern of actions could "merge into" an enterprise. Hence, Plaintiffs are unable to further describe their disavowal of such an allegation, but invite further clarification from the Court

8. **Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.**

#### Plaintiffs' Response:

Plaintiffs incorporate by reference their response to ¶s 2, 3, 5, and 6, supra.

The racketeering activity of AOS and AOSHPI is distinct from the usual and lawful activities of the enterprise of which AOS and AOSHPI were a part. See Amended Complaint, ¶s 2 and 3. In addition to manufacture, marketing and sales of Harvestore silos, the usual, daily activities of the enterprise include the manufacture, marketing and sale of "Slurrystore" Manure Processing Systems, The Harvestore Wa-Ro-Matic, various types of augers, grain weighers, roller mills, mineral meters, supplement meters, flight conveyors, belt conveyers, electronic scales, belt feeders, Super Shuttle I & II, cycling feeders, Rotary Hot Feeder, various types of pumps, Slurrystore spreaders, control centers, feed bunk floors, standby alternators, grain reconstituters and grinder-blowers.

Each of these items was manufactured and marketed by AOS and/or AOSHPI and was available for sale at and sold by MVBA.<sup>2</sup>

The pattern of racketeering activity, on the other hand, is limited to the creation and dissemination of fraudulent representations about the properties of the Harvestore brand silos (using United States mails and interstate wires to execute the fraud), in connection with the marketing of those silos.

AOS and AOSHPI alone were knowing participants in the fraudulent scheme. AOS originally conceived and developed Harvestore silos in the late 1940's, and was the original author of the false representation that the silos excluded oxygen. AOS was also the party which conducted the original research proving the representation false.

Sometime after AOS incorporated AOSHPI in 1961, AOSHPI assumed responsibility for manufacturing Harvestore silos. AOSHPI became the primary author of post-1961 incarnations of the "oxygen limiting" representation and collateral fraudulent representations. The Defendants, however, worked together to execute the fraudulent scheme. AOS reviewed and approved all of AOSHPI's sales and promotional materials, including specifically, materials containing the fraudulent representations. AOS and AOSHPI both commissioned and reviewed scientific studies which demonstrated the falsity of the "oxygen limiting" representation, and the Defendants shared with each other the results of those studies. Amended Complaint ¶26. AOSHPI

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<sup>2</sup>MVBA also sold farm equipment and livestock semen outside of the enterprise. Amended Complaint ¶4.

assumed responsibility for the AOS-created dealer network and trained salespersons. This training included training in the false "oxygen limiting" representation. AOS and AOSHPI shared responsibility for the direct mail program, which included the dissemination of fraudulent representations.

MVBA and the Dealer Organization were unwitting pawns in the fraudulent scheme. Its salespersons were trained in the fraudulent representations by AOSHPI and presented them to purchasers, including the Plaintiffs. MVBA, however, did not know the representations were false.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

Plaintiffs' Response:

As an association-in-fact without legal identity, the RICO enterprise had no bank account, assets or bottom line and could not directly participate in the fruits of the racketeering activity. AOS and AOSHPI were the primary beneficiaries of the pattern of racketeering activity, and they used those fruits to perpetuate the enterprise. See Plaintiffs' response to ¶s 2 and 11(b). If the enterprise is determined to be MVBA or the Dealer Organization, there was a profit on the sale of the silos, but, again the Defendants were the primary beneficiaries of the pattern of racketeering activity.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

Plaintiffs' Response:

The Harvestore silos were sold nationally. Manufactured either in Wisconsin or Illinois, they were shipped from the place of manufacture to the purchasing farm, in this and most instances, across state lines. (Victims are from many states. See Plaintiffs' response to ¶4.)

Moreover, the products of the farms purchasing Harvestore silos often moved in interstate commerce. These products were often of inferior quality because they were the result of the feeding of oxygen and heat-damaged feed.

11. If the Complaint alleges a violation of 18 U.S.C. §1962(a), provide the following information:

- a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt.

Plaintiffs' Response:

Although MVBA received a profit as a result of, and incidental to, AOS and AOSHPI's pattern of racketeering, the primary beneficiaries were AOSHPI and AOS.



- b. Describe the use or investment of such income.

Plaintiffs' Response:

Income was mingled with the general funds of AOS and AOSHPI, where it was invested in the enterprise. Such uses include, inter alia: development of promotional literature containing fraudulent representations; publication of that literature, dissemination of the literature; maintenance of mailing lists to facilitate that dissemination; training of dealer-employed salespersons; creation of films containing fraudulent representations; enhancement of the dealer network and manufacture of Harvestore silos sold by MVBA. See also Amended Complaint ¶79.

12. If the Complaint alleges a violation of 18 U.S.C. §1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

Plaintiffs' Response:

Not applicable.

13. If the Complaint alleges a violation of 18 U.S.C. §1962(b), provide the following information:

- a. State who is employed by or associated with the enterprise.

- b. State whether the same entity is both the liable "person" and the "enterprise" under §1962(c).

Plaintiffs' Response:

Not applicable.

14. If the Complaint alleges a violation of 18 U.S.C. §1962(d), describe in detail the alleged conspiracy.

Plaintiffs' Response:

Although Plaintiffs have not alleged a violation of §1962(d), they may petition the Court to allow such a claim. For that reason, Plaintiffs respond to ¶ 14.

At all times during the perpetration of the fraudulent scheme, AOS and AOSHPI acted in combination and concert. Concerted activity includes both authorship and dissemination of fraudulent representations, as described in detail in Plaintiffs' responses to ¶s 2, 3, 5, and 8 supra.

15. Describe the alleged injury to business or property.

Plaintiffs' Response:

Plaintiffs were injured in the following particulars:



- i. They expended monies for a Harvestore silo which did not preserve feed as represented.
- ii. They incurred increased costs as a direct and proximate result of their use of their Harvestore silos, including increased feed costs, increased veterinary costs and incidental expenses associated therewith.
- iii. They suffered decreased milk production (lower quality and quantity) as a result of feeding oxygen and heat-damaged feed.
- iv. Their herd suffered breeding problems, general unthrifty physical condition, higher than normal cull rates and increased incidence of disease.
- v. The production and health problems engendered by the use of the Harvestore dramatically and adversely impacted the economic performance of Plaintiffs' dairy operation.

**16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.**

Plaintiffs' Response:

Plaintiffs purchased their Harvestore silos in reliance upon the fraudulent representations which were the heart of AOS

and AOSHPI's fraudulent scheme, and suffered damages as a result. AOS and AOSHPI used the U.S. mails, interstate wires, and proceeds from previous fraud victims to execute the fraud upon Plaintiffs. In addition, after the sale, the Defendants continued to fraudulently represent the silo and the source of problems associated with its use, while at the same time, actively concealing their own research demonstrating the essential product design flaws. Amended Complaint ¶26. Plaintiffs, as a result, were prevented from learning the truth about product design, searched vainly elsewhere for a solution to on-farm problems and continued to use the silo to their detriment until 1991.

**17. List the damages sustained by reason of the violation of §1962, indicating the amount for which each Defendant is allegedly liable.**

Plaintiffs' Response:

Plaintiffs are unable to ascertain their damages at the present time, but they are well in excess of \$50,000 and will likely be in excess of \$1,000,000. AOS and AOSHPI are jointly and severally liable for all Plaintiffs' damages. Plaintiffs damage analysis from Dr. Michael Behr is attached as Exhibit H. This report will be updated before trial.

**18. List all other federal causes of action, if any, and provide the relevant statute numbers.**

Plaintiffs' Response:

None.

**19. List all pendent state claims, if any.**

Plaintiffs' Response:

See Counts I, II, V - IX Amended Complaint. Intentional Misrepresentation, Negligent Misrepresentation, False Advertising, Consumer Fraud, Misrepresentation of Quality, and Deceptive Trade Practices.

**20. Provide any additional information that you feel would be helpful to the Court in processing your RICO claim.**

Plaintiffs' Response:

**A. Other Judicial Decisions**

Several judicial decisions deal with issues similar to those presented here, and claims against AOS and/or AOSHPI. In particular, two decisions from the U.S. District Courts in Michigan have import. These decisions are Thiss v. A.O. Smith Corporation and A.O. Smith Harvestore Products (U.S. District Court W.D. Michigan, Order of Richard A. Enslen, U.S. District Judge, June 29, 1993) attached as Exhibit I; and Mohr v. A.O. Smith Corporation and A.O. Smith Harvestore Products, Inc. (U.S. District Court E.D. Michigan, Order of March 25, 1993 by Robert H. Cleland, U.S. District Court), attached as Exhibit J. In these two lawsuits, these same Defendants made motions on the grounds of statute of

limitations, as well as insufficient allegations regarding a RICO enterprise, AOS' liability under RICO, and constitutionality of RICO. In each instance, the U.S. District Court denied Motions for Summary Judgment.

In addition, Plaintiffs believe that the Court will be enlightened by a review of the following cases:

- i. Lollar v. AOSHPI, 795 S.W.2d 444 (MO App. 1990) attached as Exhibit A. "The internal documents of AOSHPI showed that AOSHPI knew for many years the existence of problems of oxygen intrusion into the Harvestore structures and the resulting problems oxygen caused on the stored feed." Id. at 449.
- ii. Agristor Leasing (v. Taylor) v. AOSHPI, 869 F.2d 264 (6th Cir. 1989) attached as Exhibit K. " . . . the reality, as AOSHPI knew, was that grain stored in Harvestore silos was subject to excessive spoilage and secondary fermentation because of design flaws." Id. at 268-269.
- iii. First National Bank of Louisville v. Brooks Farms, 821 S.W.2d 925 (Tenn. 1991) attached as Exhibit L;
- iv. Memorandum and Order, Honorable John Gowan, Kronebusch v. AOS, June 1991, attached as Exhibit M. "Defendants knew of the limitations of the Harvestore silo in

preventing oxygen from coming into contact with stored feed, and knew of the potential its product had to cause herd damage and diminish milk production in dairy enterprises, yet they persisted in an advertising and marketing campaign over many years stressing product virtues they knew were false, all the while shielding from the public the information which undermined these claims." *Id.* at page 17, paragraph 6.

- v. First National Bank of Louisville v. Brooks Farms, (Post-trial Memorandum of Honorable William B. Cain, November 2, 1988) (*Id.* at page 6) (guilty of unmitigated fraud), attached as Exhibit N.
- vi. Buller v. AOSHPI, MN Court of Appeals (unpublished October 13, 1993) (Petition for Review Granted) attached as Exhibit G. "The trial court found that AOSHPI knew as early as 1953 that the Harvestore silos did not perform as advertised, that they were not airtight and that they allowed spoilage. Long before appellants purchased the silos, AOSHPI knew some of their representations about the silos performance were false." *Id.* at 10.

Plaintiffs would also refer to the Court to those other decisions which have been previously referred to herein at page 14.

#### B. New York Consent Decree

In addition, in or about October of 1991, the State of New York brought an action against AOSHPI alleging violation of various New York regulatory and consumer protection statutes. The action was brought as a result of the New York Attorney General's investigation revealing that Harvestore silos were not "oxygen limiting" and did not perform as represented.

Within days, AOSHPI entered a Consent Order and Judgment with the State of New York, which established a program of arbitration for compensating victims of AOSHPI's acts and sharply limited the representations AOSHPI could make in connection with the sale of Harvestore silos. Under the Consent Order, AOSHPI is enjoined from representing that the silos are "oxygen-free" and requires that any "oxygen limiting" representation be followed by an express definition of the term substantially different from the one previously used. The 59-page Consent Order and Judgment recites, of course, that AOSHPI denied wrongdoing.

#### C. Ohio Class Action

Finally, this Court should be aware that a Class Action lawsuit has been initiated in the United States District Court for the Southern District of Ohio, Western Division, entitled Stanley Ilhardt, et al. v. A.O. Smith Corporation and A.O. Smith Harvestore Products, Inc. as case number C-1-92-635. The putative Plaintiffs moved for certification of the class and the motion was orally argued before the Honorable Herman J. Weber on August 6, 1993, in Cincinnati, Ohio. No ruling has



yet been made by the Court. Defendants in this lawsuit, are the same Defendants in Ilhardt. They have vigorously contested class action treatment alleging, among other things, that each lawsuit must be handled individually, by the courts in which they are pending or may be filed.

Dated this 11th day of February, 1994.

Respectfully submitted,

BIRD AND JACOBSEN

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(Attached Exhibits Omitted in Printing)

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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Case No. 4-93-822 (JMR)

MARVIN KLEHR and MARY KLEHR,

Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCTS,  
INC., and  
A. O. SMITH CORPORATION,

Defendants

AFFIDAVIT OF WILLIAM G. OLSON

Dr. William G. Olson, being first duly sworn, states and alleges as follows:

1. My name is William G. Olson. I am an Associate Professor of Clinical and Population Sciences at the University of Minnesota Veterinary School, St. Paul campus. I have a doctor of veterinary medicine degree and a Ph.D. in Dairy Science from the University of Minnesota. As part of my duties with the University of Minnesota, I coordinate the Nutrition Program at the Veterinary School and I visit and evaluate dairy farms on a regular basis. Attached hereto is a true and accurate copy of my curriculum vitae.

2. I have visited and inspected the dairy farming operation, the dairy animals, the 25 x 80 Harvestore silo and the feed stored in the 25 x 80 Harvestore silo on the dairy farm of Marvin Klehr and made observations as follows:

A. On March 22, 1991, I first visited the dairy farm of Marvin Klehr. At this visit I performed a general overview of the dairy farming operation. At the time of the visit Mr. Klehr was using his 25 x 80 Harvestore structure to store forages which he fed to his dairy cattle. I reviewed generally with Mr. Klehr his milk production history and DHIA records since he began using the 25 x 80 Harvestore structure. I observed Mr. Klehr's dairy animals to be in average to poor body condition, with rough hair coats. The 25 x 80 Harvestore structure was structurally sound with no apparent leaks. The door was pressurized when we opened it. I observed the feed in the 25 x 80 Harvestore silo to be dark, caramelized, with some mold and a bad smell for ensiled alfalfa. Dark, caramelized, or molasses smelling feed is indicative of heating of the feed while stored in the Harvestore structure. A sample of this feed was submitted for analysis. The feed sample reported a 19% ADIN. This level of ADIN is the result of heating of the feed while stored in the Harvestore silo. The heating of the feed is the result of exposure of the feed to oxygen while stored in the Harvestore structure. Heating of feed has detrimental effects on the nutritional value of the stored feed, among them the binding of proteins

and carbohydrates making them undigestible and nutritionally unavailable to the animal.

B. On April 15, 1991, I revisited the dairy farm of Marvin Klehr. At that time, the access door was removed from the 25 x 80 Harvestore structure and we videotaped the feed on the interior of the structure. In the interior of the structure there was a cavity in the feed 15 to 20 feet high. The feed in the structure was dark colored. The interior walls of the feed cavity were covered with various colors of mold. Mold is the result of oxygen access to the feed while stored in the Harvestore structure. Mold is detrimental to the nutritional value of the feed on which the mold is growing. Mold and its presence in feed can adversely affect milk production and cattle health due to (1) poor palatability and (2) possible buildup of toxins in the feed.

C. On approximately April 22, 1991, I returned to the Klehr farm. The access door was again removed from the 25 x 80 Harvestore structure. On this occasion I brought better video and lighting equipment to observe the feed in the interior of the Harvestore structure. Again the feed in the interior of the Harvestore structure was dark colored and covered with various colors of mold.

D. On May 1, 1991, I visited the dairy farm of Marvin Klehr. Mr. Klehr had stopped

feeding his milking cows from the 25 x 80 Harvestore structure.

E. During the course of my visits, I was advised that Mr. Klehr began feeding from the 25 x 80 Harvestore structure in early June 1975. I was advised by Mr. Klehr that over the period of time that he fed his dairy cattle from the 25 x 80 Harvestore structure that his cows exhibited various symptoms including dull eyes, rough hair coat, thin body condition, occasions of lowers feed intake, high somatic cell problems, lengthened calving interval, reduced conception rate and, increased infections. I was advised by Mr. Klehr that during parts of each year that Mr. Klehr used the 25 x 80 Harvestore structure, that feed from the 25 x 80 Harvestore structure had a molasses or caramelized smell and color with some visible mold present in the feed. Although I saw large amounts of mold on the interior of the structure on the occasions I looked into the cavity, when we ran the feed out of the unloader, the mold could hardly be seen because it had been chopped and mixed with the feed by the operation of the bottom chain unloader. Mr. Klehr stated that the feed that we ran out of the unloader on these occasions looked the same as the feed that he had removed and fed over the years from the 25 x 80 Harvestore structure. Based upon Mr. Klehr's description of the feed during the years that he fed from the 25 x 80 Harvestore structure, it is my opinion that the feed was not protected from the access of oxygen and was damaged.



F. On June 26, 1992, I visited the dairy farm of Marvin Klehr. I talked with Mr. Klehr regarding his feeding program. Mr. Klehr had not fed his dairy cows from the 25 x 80 Harvestore structure for more than one year. Since that time, Mr. Klehr had been feeding chopped based hay in the place of the forage that he had been feeding from the 25 x 80 Harvestore structure. I discussed with Mr. Klehr his herd's milk production since he had stopped feeding from the 25 x 80 Harvestore structure. Mr. Klehr stated and his DHIA records showed that his rolling herd average milk production had increased approximately 4000 lbs per cow since he stopped feeding from the 25 x 80 Harvestore structure. The body condition of Mr. Klehr's dairy cows was much improved over what it had been the year before and their hair coats were slick and shining. I was advised by Mr. Klehr that his dairy cattle's health was considerably better than it had been the year before and breeding problems had subsided.

4. I have discussed Mr. Klehr's dairy farming operation with Dr. Steve Kreuser, DVM, a veterinarian who treated Mr. Klehr's dairy cattle during the period that Mr. Klehr fed from the 25 x 80 Harvestore structure and to some extent since he stopped feeding from the 25 x 80 Harvestore structure. Dr. Kreuser's observations of the conditions and health of the dairy cattle were consistent with what I had been told by Mr. Klehr.

5. From my observations of Mr. Klehr's farming operation and discussion of his dairy farming practices with Mr. Klehr and Steve Kreuser, DVM, it is apparent that Mr. Klehr is an excellent dairy farm manager.

6. I have reviewed the damages report prepared by Dr. Michael Behr and, to some extent, the DHIA records of Marvin Klehr. Since the time Mr. Klehr stopped feeding his dairy cattle from the 25 x 80 Harvestore structure, milk production has increased in excess of 6000 pounds per cow, a level of increase far in excess of the level of increase of milk production that would be expected of dairy farmers generally. Since that time, the health and condition of Mr. Klehr's dairy cows has improved significantly.

7. Based upon my education, training, experience and knowledge of veterinary medicine, dairy science and nutrition, my review of Mr. Klehr's dairy farming operation, my review of Mr. Klehr's milk production for the period that he fed from the 25 x 80 Harvestore structure, and considering Mr. Klehr's obvious level of management ability, it is my opinion that over the period of time that he was feeding from the 25 x 80 Harvestore structure, Mr. Klehr's dairy cows did not produce milk at the level that they should have produced, did not produce milk at the level that they otherwise would have produced, and that Mr. Klehr suffered money damages as a consequence.

8. In the course of my profession, I have had occasion to visit many farms which had Harvestore structures and to investigate many complaints of farmers who were using, storing and feeding from Harvestore structures.

9. Based upon my training, education, experience and knowledge of veterinary medicine, animal science, and nutrition, my investigation of the Klehr farm, the description of the dairy cows and feed from the 25 x 80 Harvestore structure during the period that he fed from the 25 x 80 Harvestore structure, the level of milk production during the period that Mr. Klehr fed from the 25 x 80 Harvestore structure, the dramatic increase in milk production and improvement in health and condition of the cattle after Mr. Klehr stopped feeding from the 25 x 80 Harvestore structure, and my investigations of complaints of farmers using and feeding from Harvestore structures, it is my opinion that the feed stored in the 25 x 80 Harvestore structure was not properly preserved and was damaged, that this damage resulted in Mr. Klehrs' failure to reach the level of milk production that he otherwise would have produced had Mr. Klehr not been using and feeding from the 25 x 80 Harvestore structure, that feeding from the 25 x 80 Harvestore structure resulted in reduced animal health, reproductive efficiency, and body condition, and that Mr. Klehr's dairy farming operation, therefore, suffered substantial financial damages.

10. I have made an extensive review of research and development reports generated by A. O. Smith Corporation and A. O. Smith Harvestore Products, Inc., the manufacturers of Harvestore structures, inter and intra-office documents, memoranda, correspondence and research and development reports of A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation regarding the qualities and performance of the Harvestore structures dating back to the early 1950's. In addition, I have reviewed printed brochures and films produced and distributed by the manufacture which contain representations of the manufacturer regarding the supposed

quality and character of the Harvestore structures, particularly their supposed "oxygen-limiting" capability. Although Harvestore structures are now characterized as "oxygen-limiting", the explanation or definition applied to that characterization by the manufacturer is the same as the explanation of the "oxygen-free" characterization previously used by the manufacturer. Regardless of the characterization, Harvesters are represented as protecting the stored feed from the access of oxygen to the extent necessary to properly store and preserve feed.

11. It is my opinion, based upon my education, training, experience and knowledge of veterinary medicine, dairy science, nutrition, my investigation of complaints of farmers using, storing and feeding from Harvestore structures, my review of research and development reports and inter and intra-office documents, correspondence and reports regarding Harvestore structures and my review of Harvestore promotional materials, that Harvestore structures, including these manufactured in 1974, do not protect the stored feed from the access of oxygen and do not perform, store and preserve feed in the manner represented in their printed promotional materials and films and that this failure to protect the feed from oxygen creates a high probability of damage to the dairy animals, milk production of dairy farms, including the dairy farming operation of Marvin Klehr. It is further my opinion from my review of the research and development reports and the inter and intra-office memoranda and correspondence generated by A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation, that A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation have known for years, and prior to the time of the sale of the structure to Mr. Klehr in 1974, that the Harvestore structure,



particularly larger diameter structures including the 25 foot diameter structures as sold to Mr. Klehr, did not prevent the access of oxygen to the stored feed and did not perform, store and preserve feed as represented and knew that these failures created a high probability of damage to users of Harvestore structures. The documents and reports generated by A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation regarding the Harvestore structure demonstrate that the manufacturers were aware of the high probability of damage to the feed stored in the Harvestore structure and the adverse effects of such damage to the dairy animals.

Dated this the 20th day of April, 1994.

/s/ William Olson  
William Olson

(Attached Exhibit Omitted in Printing)

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Case No. 3:94-424

MARVIN KLEHR and MARY KLEHR,

Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCTS,  
INC., and  
A. O. SMITH CORPORATION,

Defendants.

AFFIDAVIT OF WILLIAM G. OLSON

Dr. William G. Olson, being first duly sworn, states and alleges as follows:

1. My name is William G. Olson. I am an Associate professor of Clinical and Population Sciences at the University of Minnesota Veterinary School, St. Paul campus. I received a Doctor of Veterinary Medicine degree from the University of Minnesota in 1966 and a Ph.D. in Dairy Science from the University of Wisconsin in 1972. As part of my duties with the University of Minnesota, I coordinate the Nutrition Program at the Veterinary School and I visit and evaluate dairy farms on a regular basis.



2. I have visited, inspected and reviewed the history of the dairy farming operation, the dairy animals, the 25 x 80 Harvestore silo and the feed stored in the 25 x 80 Harvestore silo on the dairy farm of Marvin Klehr and made observations as follows:

A. On March 22, 1991, I first visited the dairy farm of Marvin Klehr. At this visit I performed a general overview of the dairy farming operation. At the time of the visit Mr. Klehr was using his 25 x 80 Harvestore structure to store forages which he fed to his dairy cattle. I observed the feed in the 25 x 80 Harvestore silo to be dark, caramelized, with some mold and a bad smell for ensiled alfalfa. Dark, caramelized, or molasses smelling feed is caused by the heating of the feed while stored in the Harvestore structure. The heating of the feed is the result of microbial activity resulting from exposure of the feed to oxygen while stored in the Harvestore structure. Heating of feed has detrimental effects on the nutritional value of the stored feed, among them the binding of proteins and carbohydrates making them undigestible and nutritionally unavailable to the dairy cow.

B. On April 15, 1991, I revisited the dairy farm of Marvin Klehr. At that time, the access door was removed from the 25 x 80 Harvestore structure and we videotaped the feed on the interior of the structure. In the interior of the structure there was a cavity in the feed 15 to 20 feet high. The feed in the structure was dark colored. The interior walls of the feed cavity were covered with various colors of mold. Mold is the result of oxygen access to the feed while in the Harvestore

structure. Mold is detrimental to the nutritional value of the feed on which the mold is growing. Mold and its presence in feed can adversely affect milk production and cattle health due to (1) poor palatability; (2) possible buildup of toxins in the feed; and (3) reduced nutritional value of the feed.

C. On approximately April 22, 1991, I returned to the Klehr farm. The access door was again removed from the 25 x 80 Harvestore structure. On this occasion I brought better video and lighting equipment to observe the feed in the interior of the Harvestore structure. Again the feed in the interior of the Harvestore structure was dark colored and covered with various colors of mold.

D. On May 1, 1991, I visited the dairy farm of Marvin Klehr. Mr. Klehr had stopped feeding his milking cows from the 25 x 80 Harvestore structure.

E. During the course of my visits, I was advised that Mr. Klehr began feeding from the 25 x 80 Harvestore structure in early June 1975. I was advised by Mr. Klehr that over the period of time that he fed his dairy cattle from the 25 x 80 Harvestore structure that his cows exhibited various symptoms including dull eyes, rough hair coat, thin body condition, occasions of lowers feed intake, high somatic cell problems, lengthened calving interval, reduced conception rate and, increased infections. These symptoms, individually or in combination with one or more, can be caused by numerous factors, many of which are not related to the feeding of damaged or moldy feed. Milk production, in particular,

can be affected by many different factors, including, among others, disease and management. I was advised by Mr. Klehr that during parts of each year that Mr. Klehr used the 25 x 80 Harvestore structure, that feed from the 25 x 80 Harvestore structure had a molasses or caramelized smell and color with occasions of some visible mold and was generally warm to the touch. Although I saw large amounts of mold on the feed in the interior of the structure on the occasions, that I looked into the cavity in April 1991, when we ran the feed out of the unloader, the mold could hardly be seen because it had been chopped up and mixed with the feed by the operation of the bottom chain unloader. Mr. Klehr stated that the appearance of the amount of mold in the feed that we ran out of the unloader on these occasions was similar to the amount of mold that he had seen on occasions in the feed that he had removed and fed over the years from the 25 x 80 Harvestore structure.

3. I have discussed Mr. Klehr's dairy farming operation with Dr. Steve Kreuser, DVM, a veterinarian who treated Mr. Klehr's dairy cattle during the period that Mr. Klehr fed from the 25 x 80 Harvestore structure and to some extent since he stopped feeding from the 25 x 80 Harvestore structure. Dr. Kreuser's observations of the conditions and health of the dairy cattle were consistent with what I had been told by Mr. Klehr.

4. I have reviewed the damages report prepared by Dr. Michael Behr and, to some extent, the DHIA records of Marvin Klehr.

5. I have made an extensive review of research and development reports generated by A. O. Smith Corporation and A. O. Smith Harvestore Products, Inc., the manufacturers of Harvestore structures, and inter and intra-office documents, memoranda, correspondence and reports of A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation regarding the qualities and performance of the Harvestore structures dating back to the early 1950's. In addition, I have reviewed printed brochures and films produced and distributed by the manufacture which contain representations of the manufacturer regarding the supposed quality and character of the Harvestore structures, particularly their supposed "oxygen-limiting" capability. Although Harvestore structures are now characterized as "oxygen-limiting", the explanation or definition applied to that characterization by the manufacturer is the same as the explanation of the "oxygen-free" characterization previously used by the manufacturer. Regardless of the characterization, Harvestores are represented as protecting the stored feed from the access of oxygen to the extent necessary to properly store and preserve feed.

6. It is my opinion, based upon my education, training, experience and knowledge of veterinary medicine, dairy science and nutrition, and my investigation of complaints of farmers using, storing and feeding from Harvestore structures, my review of research and development reports and inter and intra office documents, correspondence and reports regarding Harvestore structures and my review of Harvestore promotional materials, that Harvestore structures do not protect the stored feed from the access of oxygen and do not perform, store and preserve feed in the manner represented in their printed promotional materials and films



and that this failure to protect the feed from oxygen created a high probability of damage to the dairy animals, milk production and the dairy farming operation of Marvin Klehr.

The research and development reports and the inter and intra office memoranda and correspondence generated by A. O. Smith Harvestore products, Inc. and A. O. Smith Corporation, that A. O. Smith Harvestore products, Inc. and A. O. Smith Corporation demonstrate that they have known for years, and prior to the time of the sale of the structure to Mr. Klehr in 1974, that the Harvestore structure particularly larger diameter structures including the 25 foot diameter structures as sold to Mr. Klehr, did not prevent the access of oxygen to the stored feed and did not perform, store and preserve feed as represented and knew that these failures created a high probability of damage to users of Harvestore structures.

7. I am advised that Marvin Klehr was told by representatives of A. O. Smith Harvestore Products, Inc., or its dealer, and through promotional materials produced by A. O. Smith Harvestore Products, Inc., that the dark, molasses colored and smelling feed that he observed on occasions in the 25 x 80 Harvestore structure was the type of feed to be expected from a Harvestore structure and that it was good feed for his dairy animals. I have reviewed A. O. Smith Harvestore Products, Inc. the promotional material styled, "Do You Have A Nose For Good Feed?" (attached), which I am advised was received by Marvin Klehr. It represents that the molasses smelling feed is good, top quality superior feed for dairy cows. It is my opinion that any representations that warm, dark, molasses colored and/or smelling feed is desirable and good feed for dairy cows is not true. I am advised by Mr.

Klehr that it had been represented to him in printed promotional materials and films, and in statements made by the salesmen, that Harvestore feed would be and was expected to be warm to the touch and that this warm touch is desirable in preventing freezing and more pleasing for the cattle to eat. The warmth of the feed is due to the continued microbial activity in the feed due to exposure to oxygen. As stated, warm temperature and dark, molasses color or smell are characteristic of heating of the feed while in the Harvestore structure, is caused by access of the feed to oxygen, and makes the nutrients unavailable for use by the dairy cow. A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation's documents reveal their knowledge and awareness of the risk of heat damaged feed, the characteristics of heated feed and the effect feeding such feed has on cattle. I was further advised by Marvin Klehr that he was told by representatives of A. O. Smith Harvestore Products, Inc., or its dealer, over the years that he used the 25 x 80 Harvestore structure that whatever mold he saw coming from the Harvestore structure was a slight layer of mold between the various fillings of the Harvestore structure and was to be expected on occasion. He was told that that mold was not enough to adversely affect his cows. Research and development document and correspondence and memorandum of A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation reveal their knowledge and awareness of mold and secondary fermentation problems in the feed in the dome or cavity of the Harvestore structure. Such representations and statements that the mold comes from the layers between fillings of the structure and that warm molasses colored and smelling feed is desirable and good feed are not true and lead the farmer to a false sense-of security regarding the performance of the Harvestore structure and feed stored in it



and keep the farmer from knowing or learning the truth regarding the quality or condition of his feed and the performance of the Harvestore structure.

8. Many of the research and development reports prepared by A. O. Smith Harvestore Products, Inc. or A. O. Smith Corporation regarding the character and performance of the Harvestore structures show on their face that they are secret and confidential. I am familiar with research regarding feed storage and preservation which is made available in the field of veterinary medicine, dairy science and nutrition. I have contact with individuals in the field of veterinary medicine and dairy science on a regular basis, including those in the academic community as well as practitioners and farmers. The research and development reports prepared by A. O. Smith Harvestore Products, Inc. and A. O. Smith Corporation regarding the Harvestore structures and internal correspondence and memorandum which reflect the manufacturers knowledge regarding its product and its product failures have not been made available to those in academics, practitioners or farmers in the field of veterinary medicine and nutrition and animal science.

There are many reasons that one may experience production, health and/or reproductive problems on a dairy farm. These include, but certainly are not limited to: cattle disease, chronic or acute; farm management practices, including milking procedures, sanitation, and cattle management and care; reproductive management and practices, nutritive value of raised crops which may be effected by such things as weather, cropping practices and harvesting management practices; and nutrition, including proper ration and mineral balancing.

My investigation of the history of the Klehr dairy farm reveals that health and reproductive problems experienced on the Klehr dairy such as feet and leg problems, uterine infections, lengthened calving interval, cows off feed, displaced abomasum, and unthirty appearance, were in large part typical of the types of health and reproductive problems that occur on all dairy farms, except that the Klehr's' dairy farm experienced increased incidents of some such problems at various times. The problems which were excessive were scattered over a ten to fifteen year period of time, several of which did not manifest themselves until many years after the Klehrs began using the 25 x 80 Harvestore structure. My investigation of the history reveals no immediate outbreak of health or production problems immediately after the Klehrs began using the 20 x 80 Harvestore structure. -

Mr. Klehr's milk production did increase the first year or two after he began to use the 25 x 80 Harvestore structure at a rate more than otherwise would have been expected. Thereafter his milk production was periodically up and down the remainder of the time he used the 25 x 80 Harvestore structure. It is typical on any dairy farm that milk production experiences increases and decreases over the course of years and even within each year due to cyclical seasonal variations. On the whole, however, milk production historically has increased over time. Mr. Klehr, likewise, experienced periodic increases and decreases in production which he attributed at the time to various factors such as increase in herd size, participation in milk diversion program and three times a day milking. It is a review of Mr. Klehr's' milk production over the entire period of use of the Harvestore structure that reveals that Mr. Klehrs milk production did not progress over time relative to the rest of the dairy industry. Given the milk

production history of the Klehrs it is not unreasonable that Mr. Klehr, an individual farmer, would not discover the correlation between his milk production and his use of the 25 x 80 Harvestore structure.

My review of the history of the Klehr farm reveals that Mr. Klehr followed the reasonable steps, contacted the reasonably expected professionals, such as veterinarians and nutritionists, and made reasonable effort to address and determine the source of problems experienced on his farm. My review of the history of the Klehr dairy reveals no circumstance of production or animal health that necessarily would have or necessarily should have, put Mr. Klehr on notice that the 25 x 80 Harvestore structure or the feed stored in it was the source or cause of any of his problems. It would not have been unreasonable for Mr. Klehr's attention and other reasons for such problems and it would not have been unreasonable that he did not know or even suspect that the source of the problem was the Harvestore structure.

Dated this the 31st day of May, 1994.

/s/ William Olson  
WILLIAM OLSON

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Case No. 3:94-CV-424

MARVIN KLEHR and MARY KLEHR,

Plaintiffs,

vs.

A.O. SMITH HARVESTORE PRODUCTS, INC., and  
A.O. SMITH CORPORATION,

Defendants

AFFIDAVIT OF MARVIN KLEHR

Marvin Klehr, being first duly sworn, states and alleges as follows:

1. That he is one of the Plaintiffs in the above entitled cause, and has personal knowledge of the facts and circumstances recited herein.
2. On or about the 15th day of July, 1974, I entered into an agreement to purchase a 25 x 80 Harvestore feed storage structure. Before entering into this agreement, I was approached by Dick Deutsch, a salesman from MVBA Harvestore Systems, regarding the purchase of such a Harvestore structure.



3. Before entering into the agreement to buy the Harvestore structure, I received various pieces of printed literature and films produced by A. O. Smith Harvestore Products, Inc. which made representations regarding the character and quality of Harvestore structures. Mr. Deutsch also made representations regarding the quality and character of the Harvestore structures. Among the representations made to the Klehrs in the promotional materials and films and Mr. Deutsch were that the Harvestore structure: (1) was "oxygen-limiting" and would not permit oxygen to come into contact with the stored feed and that the structure, therefore, (2) would properly store and prevent spoilage of the feed; and (3) would produce better, more palatable and more digestible feed. Promotional materials and advertisements that I received prior to my decision to buy the Harvestore are set forth in Paragraph 10 of the Amended Complaint.

4. Mr. Deutsch told me and I was provided promotional material prior to my purchase of the structure, (accurate copy of one is attached as Exhibit 1) which stated that the feed would have a molasses color and smell. Mr. Deutsch and the advertisements told me that the feed would be, and was expected to be warm, and this would mean no freezing, and therefore, the cows would eat more of it. During the period I fed from the 25 x 80 Harvestore structure, the feed was brown, warm, of molasses color and smell. Although the feed was brown, warm, of molasses color and smell, that did not give me reason for concern or question because it was exactly what I was told and believed to expect.

I began feeding from the Harvestore structure in the summer of 1975. As I stated in my deposition, during the summer of 1976, during July or August, when we started

getting into new feed that was added to the silo that year, there was a few, but not many, chunks of little mold. That was the only thing that I ever saw in the feed that I had not been told to expect as normal. The feed otherwise appeared as I expected it to be. I asked Mr. Deutsch about the mold and he told me it was the top layer of the silo, that I would see a little bit of that between fillings of feed because of the air that is blown in during filling of the silo. Because I had seen top layers of spoilage in other types of feed storage, I understood and accepted his explanation. I saw mold again in the spring of 1977 in the last week or so before it went empty. I again asked Mr. Deutsch and he again explained it was the top layer of the silo coming out. The silo went empty about a week later. The next spring, I saw the same thing. For a short period on a few occasions during the year, I would see some slight mold then it would disappear again. Because there were usually at least three cuttings of feed per year filled into the silo, I assumed these were the layers between fillings as I had been told. I was told this mold would not affect or harm my cattle. Except for the incident in 1982, discussed below, the only time we threw any feed away from the Harvestore, was when we were emptying out the structure. When the structure was nearing empty, we would clean it out and haul one or two spreader loads of the feed out and spread it on the fields. Although we saw this small amount of molded feed each year at the end of the feed stack I always thought this was the top layer of the feed which had reached the bottom. The structure was 25 feet x 80 feet. One or two spreader loads from a structure that size is nothing more than cleaning the floor of the structure.

5. In 1982, the only time I had some increased spoilage from my Harvestore haylage unit, I immediately



contacted MVBA. MVBA promptly came to my farm, inspected the silo, and retorqued and resealed the silo. The Harvestore silo was then pressure tested, and a broken breather bag was found. The bag was replaced. I was advised at that time, by the repairmen, that my silo was "completely resealed". The complete resealing of the silo, as well as replacement of the breather bag, made me believe that any potential problem that I was having on my farm certainly could not come from the Harvestore silo. Attached as Exhibit 2 are the repair invoices from MVBA for retorquing, resealing the silo, and changing the breather bag in 1982.

6. I have been engaged in farming for all my life, and I know that cows can become sick, lose milk production, be culled from the herd, or die for many reasons unrelated to feed. In addition, the components of a dairy ration are numerous. During the fifteen or sixteen years that I fed from and used the 25 x 80 Harvestore structure, my dairy cows experienced unthrifty conditions, occasions of lower feed intake, feet and leg problems, lengthened calving interval, reduced conception rate, increased infections and periods when milk production was lower than I thought it should have been. However, these problems did not occur not all at the same time, but at various scattered times over a fifteen or sixteen year period. Many of the conditions did not start for many years after I started using the Harvestore structure. While, looking back, the increased incidence in these problems did occur after I began using the Harvestore structure, at the time of the occurrence they did not occur in a time sequence which caused me to link them in any way to the use of the Harvestore structure. We attempted to address and determine the source or cause of these problems as they occurred. Every time I had what I believed to be a problem with my dairy

cattle, I promptly investigated this with experts I had routinely relied upon over the years, such as veterinarians and feed sales representatives. Various recommendations were made to address each problem. At no time before 1991, did anyone suggest to me that feed from my Harvestore silo as causing me damage on my farm. I did not know or suspect that the 25 x 80 Harvestore structure as the source or cause of these problems. Even if I had known that feed from the Harvestore silo was causing me damage, I would never have concluded that the design of the Harvestore silo was defective. Instead, my normal procedure would have been to call MVBA, in order to make necessary repairs.

7. During the first two years that I fed from the Harvestore structure, milk production increased approximately 2,000 pounds per cow on a rolling herd average. I thought I was receiving the increased milk production that was represented to me at the time I acquired the structure. When milk production leveled off or decreased in the following years, I did not know nor suspect that there was any relationship with the Harvestore. At the time I thought the decrease in production or failure to increase was due to other causes such as increase in herd size, animal health and condition and/or participation in the dairy diversion program. No one ever indicated that there was any relationship between my lack of production and the Harvestore.

8. After I purchased the Harvestore silo, it was represented at meetings at MVBA in New Prague, as well as in the Harvestore Farmer magazine, and in discussion with Mr. Deutsch, that the only way bad feed could be produced in a Harvestore was because of either a leak in the silo that could be fixed (such as a broken breather bag), or through a

management problem on the part of the farmer, such as leaving a door opened.

9. Since 1974, and even before that time, we have been receiving the Harvestore Farmer/Harvestore System Farming magazine three to four times a year. This is in addition to the advertisements that I reviewed at the time of my deposition. Every issue of the Harvestore Farmer/Harvestore System Farming has at least one story containing a testimonial from a successful Harvestore farmer. These magazines came to me in the mail directly from A. O. Smith Harvestore Products, Inc. The magazines themselves contained numerous advertisements and educational articles, relative to Harvestore products. I also received additional promotional materials over the years after I bought the 25 x 80 Harvestore structure. In addition, over the same period I had a subscription to Hoard's Dairymen which regularly had promotions and advertisements for AOSHPI structures. Up until 1991, these magazine contributed to my belief that Harvestore silos were the Cadillac of silos, and that any problem I was having on my farm, with respect to milk production, was due to my own failure in management. The materials and advertisements which I saw and relied upon after I bought the 25 x 80 Harvestore are outlined in Paragraphs 15 and 16 of the Amended Complaint. In fact, I became so depressed in the late 1980's, about not being able to increase the profitability of my farming operation, that I sought medical advice.

10. My first suspicion, that I may have some problem with my Harvestore silo, came when I read an article in the Minneapolis paper about a jury verdict against Harvestore in the Kronebusch case, in February, 1991. I contacted the

University of Minnesota. Dr. William Olson, DVM, a nutritionist came to my farm. On Dr. Olson's visit to my farm in early April 1991, following my reading of the newspaper article in the Minnesota paper, I first looked into the cavity created inside the feed in the Harvestore structure by the operation of the bottom unloader. I observed various colors of mold covering the walls of the feed on the inside of the cavity. Approximately one week later I again looked inside the cavity of feed created by the bottom unloader and again saw various colors of mold on the feed.

11. Before April 1991, I did not know, nor did I suspect that I ever had bad feed coming from my Harvestore silo, with the exception of one occasion in 1982, and during the last week or two before the silo was empty each year. I always believed before 1991 that I was getting good feed from my Harvestore, and I truly felt, up until 1991, that the Harvestore was the "Cadillac" of silos. It was my firm belief, based upon what I had read in AOSHPI advertising, what I had been told by Mr. Deutsch, both before and after I purchased the 25 x 80 Harvestore structure, and continuing up until 1991, that good Harvestore feed was warm, had a brown, molasses color and smell, and that some mold in the last week or two of feed out before the silo was emptied was normal and to be expected.

In 1991, at the time Dr. Olson came to my farm, I saw large amounts of mold inside the Harvestore silo, and observed the "churning" action of the unloader on the feed, as it was being drawn out of the silo. I also observed the feed as it came out of the unloader door, and I then realized that the churning and mixing action of the unloader was causing this mold to "disappear", so that it could not be seen by the naked



eye. Only then did I realize that I had been feeding my cattle spoiled feed for many years.

12. Under no circumstances would I ever knowingly feed my dairy cows feed which I believed to be moldy, spoiled or rotten. I was completely shocked when I saw the inside of my Harvestore silo in April, 1991, and only then realized what I had been feeding my dairy cows all those years. Since I stopped feeding my cows from the Harvestore, the rolling herd average has increased over 6,000 pounds per cow.

Dated this the 1st day of June, 1994.

/s/ Marvin Klehr  
MARVIN KLEHR

(Attached Exhibits Omitted in Printing)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 95-1355

Marvin Klehr and Mary Klehr

vs.

A.O. Smith Corporation

A.O. Smith Harvester Products, Inc.

Dear Circuit Judges:

Mary and I are taking this last step in our Appeal in our own fashion. There will be no 50 pages of lawyer language. We know that you are very busy people, and at times not enough time in a day. We are farmers and put many hours in ourselves. If you could find a few minutes to read our Appeal through our eyes, and then be kind enough to answer it we will respect your decision.

In 1974 we purchased a 25 x 80 Harvester Silo with hopes of a much better source of feed storage for our cows. Production went up the first year, as expected, and slowly over time the problems started. We had depressed cattle, twisted stomachs, foot problems, swelling of the joints on hind legs, breeding problems and our production started a slow decline. We immediately consulted with our veterinarian that came to our farm on a regular basis; however, he was unable to give me an answer to our health problems. Several times a year feed samples were taken by our feed representative, but the samples never showed "Bad Feed". He would make up a ration that called for vitamins, minerals and protein. The



sample, never showed a sign of mold. We never seen mold or bad feed come out of the silo, except some small chunks of white mold a couple of times a year; which our Harvestore representative explained as a layer of mold you get between filling. This was due to a small amount of oxygen that was left in the silo when the door was closed after filling.

The silo had some disadvantages - there are no windows or doors for you to look inside through, you cannot go in and check the feed from the bottom as there is a big sign above the unloader door that reads, "Danger-Do Not Enter-Not Enough Oxygen to Support Life". The silo is 80 ft tall and dark blue in color. Looking down from the top through the small filler hole you cannot see any feed until it is 20 ft from the top. It was just plain dark with no access to the inside when feed was in storage. We had to rely on the salesman and his experience with the silo and also the representation by A.O. Smith that testing and experimenting had been done by them before we purchased the silo.

Richard Deutsch was the only salesman and Harvestore representative we had on the farm from the time before we purchased our silo up until we stopped using it in 1991; except for servicemen who were called to do service repair and routine check-ups. Mr. Deutsch came to the farm several times a year and asked how the cows were doing in production. We would walk back to the silo and run out feed. He would pick it up in his hands, smell it, picking around at the alfalfa stem, checking for length of cut. Mr. Deutsch never commented that I had "excellent feed". He always found something wrong with it, either the smell wasn't right, it was too long, it was too short, too dry or too wet. He said the smell came from not filling the silo fast enough or leaving

the feed exit door open too long. I knew that leaving the door open too long was not the problem, as we always closed the door as soon as the feed was out. Too short or too long, he would remind me to be sure to set my chopper knife at  $\frac{1}{4}$  to  $\frac{3}{8}$ " and to keep them sharp. Too wet or too dry, he reminded me to watch the moisture when chopping - it must be 35 to 55% moisture.

Every year I did my very best to do a better job of filling. Our feed always "looked good", but just not excellent. Every spring we would haul 2 or 3 manure spreaders full of feed to the field to be spread. Seventeen years went by and I felt I was not a good enough farmer to manage this silo.

Over the years our vet and feed experts seen my feed in front of the cows. Never did they detect bad feed. Samples of the feed were taken 3 or 4 times a year. The samples never showed that it was my feed that gave our herd health problems. We even vaccinated our cattle for various diseases and still no health improvement. I never once thought it was a problem with the silo - just bad management - I could not fill the silo fast enough.

In the fall of 1990 I had motor problems on the unloader. The serviceman was called and he came out to replace the motor. I helped him carry the motor to the feedroom. I told him that over the years I never got "excellent feed" from my silo, that maybe I couldn't fill it fast enough. He told me that my problem wasn't that I couldn't fill it fast enough - he said the problem was that I couldn't empty it fast enough! That was the first time in 17 years that I thought that maybe it wasn't by management.

In the spring of 1991, I seen an article in the Star & Tribune about a farmer from Rochester, Mn who had gone to court against the Harvester silo company. In that paper it described the problems he had had with his own dairy cows. Mary described it this way when she read the article, "put our name in place of his and you just described our past 17 years of herd health, family stress and financial disaster". The article described all the same herd health problems, foot problems, breeding problems, depressed cattle and low production, thin cows and high somatic cell count.

After several days of reading the article over and over and with many discussions about this between Mary and I, we finally decided to contact the U of M Veterinary Clinic. That is how we met Dr. Bill Olson. After a lengthy phone conversation, Dr. Olson decided to come out to the farm. On his first visit we showed him the cattle, looked at our production records and then the feed we were feeding. The haylage came out of the silo looking like it did all these years

Dr. Olson took feed samples and we set up a date that he would be back. On the morning of his second visit I was told to remove the small door above the unloader and chop a hole through the haylage till I get to the center of the cavity. It took me several hours to do. The feed I was chopping was excellent haylage. When I got to the cavity I used a flashlight to shine inside on the tunnel. I could see the cavity, but that was all. Dr. Olson came and we both tried to see in the cavity. I removed more haylage from the tunnel to make the opening larger. We fastened a spotlight to a long wooden board and slid it into the tunnel. At that time we could see some chunks of mold hanging from the cavity, but still not a clear view of

the cavity. Dr. Olson decided to close the door and said he'd be back in a few days with a camera.

A few days later Dr. Olson returned bringing two of his students with him along with a video camera and small T.V. We mounted the video camera on a long board and slowly slid the camera into the tunnel. After sometime of trying, we were able to get the camera into the cavity. With a spotlight mounted next to the camera and with the small T.V. hooked up to the camera, we were able to view the full cavity. I couldn't believe what I was seeing - it was the most hideous sight I'd ever seen!! There was mold hanging all over the top of the cavity - every color under the sun. There was chunks of mold everywhere. The chain type of unloader that the Harvester silo has was started mixing my excellent haylage from the outside wall of the silo with the junk and mold in the cavity. It came out all mixed-up with no signs of the junk feed. Liken this to a jar of jelly with mold in the jar, once you stir it up the mold is mixed, you no longer see it, yet you still would be eating it. Think what that would do to you if you ate that day after day. At that moment I realized that I had been poisoning my cattle all of those years. This was the first time I was ever able to look into the cavity of the silo. Remember, the silo has no windows and a sign that reads "Danger-Do Not Enter-Not Enough Oxygen to Support Life". From the top of the silo, through the small filler hole, you do not see the cavity. The silo is dark inside and the cavity is hidden under the feed.

The door that was removed above the unloader so I could chop that tunnel is small and only used by the servicemen to fix the unloader. There is 500 to 600 tons of feed above that door - no way can a man crawl into the silo to see the cavity.



The serviceman was right - there was no way I could empty the silo fast enough to stay ahead of the mold!

Mr. Deutsch, the salesman, had me looking the other direction; I fill too slow, I chop too fine, I chop too long, I chop too wet or I chop too dry. He knew the cavity was my problem all along, even though he told me it was my management. He told me I was the only farmer that had had any problems. That day the decision was made to never use that silo again!!

On Monday, June 24, 1991 at 1:00 P.M., Mr. Richard Deutsch lied to me for the last time. He came to our farm for his annual visit. We sat down on the step by our garage and I told him of the recent problems on the farm, and of Dr. Olson coming to the farm and the discovery of mold in the silo cavity. Mr. Deutsch got very made (sic) when he heard we had filed a lawsuit against A.O Smith Corporation. He told me that the problems were all management. He told me that I was not filling the silo fast enough and that farmer John down the road, who had two grown sons and 3 hired men, big equipment, big tractors, fills his silo very fast and always has good feed. I said "Mr. Deutsch - you are wrong! Dr. Olson, from the U of M had told me that he had previously visited farmer John and that John was dissatisfied with the feed coming out of his silo. He had always had problems with warm feed coming out, as well as health problems with his cows". Mr. Deutsch looked at me and said, "he did?" With that he turned and walked away and left in his car.

That evening I called farmer John and asked him if he knew a Dr. Bill Olson. He said "yes" that Dr. Olson had been to his farm several times. John's feed nutritionist had called him to

the farm because of health problems with his cows and hot feed coming out of the silo. I asked him how long he'd been having these problems and he said, "many years". I then proceeded to ask him a few more questions regarding this:

Q. "Did Harvestor say what was causing the warm feed"?

A. "They said it was taking too long to get the feed out through the unloader door of the silo".

Q. "Who said that?"

A. "The Harvestore salesman".

Q. "What did he say you needed to do?"

A. "I needed the new "Super Giant Unloader" with more hooks so I can get the feed out faster".

Q. "What was the cost for that unloader"?

A. "Over \$35,000".

Q. "Has it helped in the quality of the feed"?

A. "No"!!

That was the end of our conversation. Several years later, farmer John changed the design of the silo by putting an unloader on top of the silo. I don't dispute farmer John filled the silo faster than I did, as he has a very large farming operation. Mr. Deutsch knew on June 24, 1991, that farmer



John had had problems and that I wasn't the only farmer out there having these problems.

Two years after shutting down my silo, the State Holstein Association of Minnesota awarded our family two awards for having two cows that achieved the highest milk award in the state of Minnesota.

We always knew we had the ability and genetics to get big production; but we just did not have the "excellent feed" we needed.

Over the years I accepted the fact that I may have bought a silo that was too big and that I could not manage it right or fill it fast enough. Never once did I connect it the health problems in the cattle with the feed in the silo.

After viewing the video, it appears in "my estimation" that 95% of the good/excellent feed was mixing with 5% of the junk and mold. With the mixing from the unloader it made it "impossible" for the naked eye to detect the junk and mold. Feed samples never detected this either; however, the health of our cattle did. I've always loved my cattle and would never do them harm. Shutting down that silo in 1991 was the easiest decision I've ever made!

All the facts in this report are true and can be found in my depositions. The video tape and Dr. Bill Olson's report is evidence in this lawsuit.

Thank you,

P.S. Please rush, as my family has waited a life time for this decision.

Marvin & Mary Klehr  
18551 Redwing Trl.  
Shakopee, MN 55379

(Signatures Omitted in Printing)

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(13)  
No. 96-663

Supreme Court, U.S.

F I L E D

FEB 21 1997

CLERK

In the  
**Supreme Court of the United States**  
October Term, 1996

MARVIN KLEHR AND MARY KLEHR

*Petitioners,*

v.

A.O. SMITH CORPORATION AND  
A.O. SMITH HARVESTORE PRODUCTS, INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX - VOLUME II

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[p. 1]

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

CIVIL DIVISION

PROPERTY DAMAGE

---

Marvin Klehr and Mary Klehr,

Plaintiffs,

vs.

File No. 91-08583

A.O. Smith Harvestore Products,  
Inc., A.O. Smith Corporation,  
MVBA Harvestore Systems, Minnesota  
Valley Breeders Co-op, Mid West  
Breeders Co-op, and 21st Century  
Genetics Co-op,

Defendants.

---

VIDEOTAPED DEPOSITION OF  
MARY KLEHR

FEBRUARY 10, 1993

\* \* \*

[p. 34] your husband or was the discussion more between

your husband and Mr. Deutsch?

A. Well, probably more between Marvin and Dick Deutsch. But I was there and I asked questions and I was in on it.

Q. Okay. Tell me what specifically you can recall Mr. Deutsch telling you about the Harvestore silo.

A. Well, I guess one thing that sticks out in my mind is the idea that no oxygen got in contact with the feed and, therefore, you would have better feed, better, healthier cows, more production and more [p.35] money.

Q. Did Mr. Deutsch tell you why you could expect to have better feed from a Harvestore silo?

A. Can you say that again?

Q. Sure. Did he explain to you why the Harvestore silo would give you better feed?

A. I guess because air didn't come in contact with the feed; therefore, you would have better feed.

Q. Did he tell you why you could expect to have healthier cows?

A. Well, because if the feed is better, naturally you're going to have healthier cows.

Q. And is that also why he told you you could expect to have more production from your cows?

A. [p. 36] Yes.

Q. Do you remember anything else that he told you about the Harvestore silo?

A. I'm sure there were a lot of things, but -- I guess I can't remember.

Q. You mentioned that you went on some farm tours. How many farm tours did you attend?

A. Well, we went out one day and we went to three different farms.

Q. Do you remember whose farms you visited?

A. I can only remember the name of one.

Q. Okay. Who was that?

A. That was Bob Leiffeld.

Q. Do you know how to spell his name?

A. Oh. No, I don't.

Q. Was he a farmer in the area around Jordan?

A. This was down by Miesville.

Q. Do you remember the names of the other two farms that you went to?

A. Not the names, no.

Q. How did you get to these farms?

A. Dick Deutsch took us.

Q. Did he take you in his car?

A. Yes.

Q. What did you do when you got to the farms?

\* \* \*

[p. 104] involvement whatsoever.

A. No. I guess I really don't have any involvement in the milking and feeding end of it.

Q. Okay. You also discussed earlier this morning about financial problems in or around 1977. And I recall or noted that you did not recall when those financial problems started. Is there a point in time that you could identify for when those financial problems eased or abated?

A. Can I make a change on something?

Q. Sure.

A. From that date of 1977, thinking about it later, it was probably the early '80s I did the bookkeeping up till.

Q. Okay.

A. So say '82. I've got, you know, the records and farm books at home will have my handwriting in them.

Q. We can tell from your entries when you stopped making those entries.

A. Right.

Q. Okay. But that doesn't change the 1977 year for what you identified as --

A. Well, that's basically, the 1982 date would probably be basically, that's when I quit doing the [p. 105] books because of financial reasons.

Q. Is it that the financial problems extended from about 1977 to 1982 or beyond or shall we disregard the 1977 reference this morning and now look at 1982?

A. Correct. Disregard the '77 and go to the '82.

Q. Okay. Well, apparently your memory is a little bit refreshed on that. Can you identify when those financial problems started?

A. I'd say within a year of the time I quit doing the books. If I quit in '82, they probably were right around '81.

Q. And do you recall any specific event that is the kind of the standard or the point in time that commenced that period? A loss in number of cows? I'm just trying to find any sort of reference in your memory that marks that time period for you.



A. Well, like I said, we were, financially it was tough. And I suppose the bottom line was the money wasn't there, so production had to be down.

Q. And I'm not trying to put words in your mouth or anything like that, but sometimes one can identify, say, a drought or, you know, a disease in the crops or something saying that's what the watershed was or the precipitant of that was for a particular [p.106] chain of events. Is there anything like that in your mind for the financial problems that you're talking about?

A. No.

Q. And then to kind of pick up where I started, is there any point in time when you feel the financial problems eased or abated after 1982?

A. Well, they've gotten somewhat better the last year or two.

Q. 1991, 1992?

A. Yes.

Q. So then is it fair to say that up until '91 or '92 there was about a ten-year period, approximately, of financial difficulties--

A. Yes.

Q. -- for your family farm?

A. Yes.

Q. And can you describe how that has impacted on you and in your family's life-style and the farm itself?

A. Well, it's made a big impact. I went out to work in 1985 for that reason. Well, needless to say, my husband and I did a lot of arguing over financial stress. And, of course, I quit doing the books and, actually I took a disinterest in anything that

\* \* \*

---

[p. 1]

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

CIVIL DIVISION

PROPERTY DAMAGE

---

Marvin Klehr and Mary Klehr

Plaintiffs,

vs.

File No. 91-08583

A.O. Smith Harvestore Products,  
Inc., A.O. Smith Corporation,  
MVBA Harvestore Systems, Minnesota  
Valley Breeders Co-op, Mid West  
Breeders Co-op, and 21st Century  
Genetics Co-op,

Defendants.

---

VIDEOTAPED DEPOSITION OF  
MARVIN KLEHR

FEBRUARY 10, 1993

...

A. [p. 6] Okay.

Q. How old are you now?

A. Forty-eight.

Q. And I think we got the information from your wife about your children. Did she say anything, did she get any names wrong with your kids?

A. No.

Q. How long have you been living on the farm where you're living now?

A. All my life.

Q. With the exception, I gather --

A. The one year that we were married I was gone.

Q. Okay. There was one year when you were in an apartment in Shakopee.

A. Yes.

Q. And that was in 1968?

A. Yes.

Q. And with the exception of that, you've been living on the farm all your life.

A. Yes.

Q. Did you complete high school?

A. No, I didn't.

Q. Okay. How many years of high school or schooling did you have?

A. I went through the tenth grade.

\* \* \*

A. [p. 15] No, not right offhand.

Q. Tell me as best you can recall what property you and your brother bought from your father. What was there in the personal property that you bought? Was it a huge long list of things?

A. Yes. It was 45 cows and, I imagine, 45 head of young stock. We bought the chickens, probably 250 chickens. Maybe 30 sows. Just guessing, maybe 200 pigs. And then all the machinery, the machinery that was there.

Q. What sorts of feed storage structures or devices did you have on the farm at that time?

A. There was a 17 by 40 Harvestore. We have a 16 by 40 clay block silo, a red clay block silo, and a 12 by 40 cement stave.

Q. How big was the cement stave?

A. Twelve by 40.

Q. And did you have any grain bins or anything like that?

A. There was one. There was one 3,200 bushel grain bin. And the granary.

Q. When you bought the personal property from your father did you buy the Harvestore silo from him? Was that included in the personal property you bought?

\* \* \*

[p. 21] silage from 1969 to 1973?

A. In about, I'd say maybe '72 we switched, went to high moisture corn. Maybe even '71. '71 or '72 we switched to high moisture corn in the 17 by 40 Harvestore.

Q. Why did you switch to high moisture corn at that time?

A. We were picking cob corn before then. We used to have the corn cribs full. The lawn was full of corn cribs all over, so we decided we were going to put it someplace under a roof.

Q. When you switched to high moisture shell corn in '71 or '72, how many years did you store high moisture shell corn in the Harvestore?

A. Up to now.

Q. Pardon me? Up till now?

A. Up to now.

Q. So since 1971 or '72 you have stored high moisture shell corn in the 17 by 40?

A. Yes.



Q. Have you stored anything else other than high moisture shell corn in the 17 by 40 since that time?

A. No.

Q. Are you still using the 17 by 40 today?

A. [p. 22] Yes.

Q. And I gather from what you just said you're still storing high moisture shell corn in the silo?

A. Yes.

Q. And what are you using that feed for now?

A. For the milk cows.

Q. Are you feeding that to your dairy cows?

A. Yes.

Q. Back in -- well, let's back up from 1969 till -- during the time you were feeding corn silage from the 17 by 40, how did you use that corn silage? What animals were you feeding with it?

A. I would say the whole farm at the time we were feeding out of it.

Q. Were you feeding it to the hogs and the dairy cows?

A. The hogs didn't get any, but the young stock got it.

Q. So you were feeding it to the young stock and the dairy cows?

A. Yes.

Q. But the hogs didn't get any of that.

A. (Witness shook head.)

Q. When you switched to high moisture shell corn in 1971 or 1972 which animals were fed the high moisture shelled corn from the 17 by 40?

\* \* \*

[p. 39] have credit with them or did you pay them off?

A. My wife has a checking account with Valley Bank. Norwest Bank is not in Jordan no more.

Q. So they're not carrying that; you don't have a loan with them anymore, is that right?

A. No.

Q. Did you pay them off at some point?

A. We went to First National Bank of Le Center in, very possibly '88, 1988.

Q. And when you went to First Bank of Le Center did you pay off Norwest Bank?

A. Yes. Everything was paid off through Norwest Bank.

Q. Are you still carrying a loan with Prudential?

A. Yes.

Q. That's just for the land?

A. Yes.

Q. Back when you bought the farm from your father in February 1974, what sort of plans did you have for the farm operation?

A. I believe expansion was in the planning.

Q. What sort of plans did you have for expansion at that time?

A. Well, we were -- I was planning on making the dairy herd size bigger.

Q. [p. 40] Do you recall what your plans were at that point in time in terms of the size of the dairy herd you wanted to achieve?

A. Well, we were talking of probably 90 to a hundred cows.

Q. Did you have any other sort of plans at that time for the farm operation?

A. Well, we were planning on installing or looking into a silo of some kind to store this feed.

Q. At that time in February of '74 did you have in mind what kind of a silo you wanted to buy?

A. No. I believe at that moment or at that time I did not know yet what I wanted.

Q. Did you have any sort of plans for the hog operation that you were still working on at that time?

A. No. The hog operation was a stable thing.

Q. I guess I should ask you this: After you bought your brother Tom out -- I understand Tom was the one who had been working with the hogs during that time you were in partnership. After he left did you continue to maintain the hog operation?

A. Yes. I was in charge of the hog operation. Yes.

Q. What was the size of the hog operation in February of 1974? Do you recall?

\* \* \*

[p. 54] got a 16 by 40 red silo.

A. Yes.

Q. And that's the red clay silo we already talked about, correct?

A. Yup.

Q. What year was that built on the farm, do you know?

A. The early '50s.

Q. And then just to the south of that you've got a 17 by 40 foot silo.

A. Harvestore.

Q. Oh, that's the 1955 Harvestore.

A. Yes.

Q. And then all along the, running north and south along, next to the silos you've got the cow barn.

A. Yes.

Q. And it looks like the cow barn may have been built in two segments, is that correct?

A. That's right.

Q. Which part was built first?

A. The northern part. Yes.

Q. When was that built?

A. 1948.

Q. What are the dimensions of the, the original dimensions of this cow barn?

A. Thirty-six by 90.

\* \* \*

[p. 113] asking him his knowledge then or his knowledge now?

MR. SHEPARD: Yeah. Then.

MR. BIRD: If you can recall.

THE WITNESS: Repeat that question.

BY MR. SHEPARD.

Q. I'm just trying to get a sense, when you used the stave silo did you understand that one of the things you were doing was reducing the access of oxygen to the feedstack in the silo?

A. No I guess I didn't understand that.

Q. What was your understanding of the effect of oxygen on feed?

A. What I knew then, at that time?

Q. Yeah.

A. I knew very little about oxygen and feed at that time.

Q. What about before 1974? You had been, up till 1974 you had been working on the farm for how many years?

A. I was 30 years old then.

Q. You had been on the farm all your life?



A. Except for one year when I was married.

Q. And you had been working, storing feed all those years, is that right?

A. [ p. 114] Yes.

Q. Did you understand that the access of oxygen could cause feed to spoil?

A. Yes I'd say at that point I had a vague idea that that's what it would do.

Q. Did you understand that the access of oxygen could cause mold?

A. Yes, I believe I had an idea that it would do that.

Q. Did you understand that oxygen could -- did you have any understanding of the effects of oxygen on the nutritional value of the feed?

MR. BIRD: What year are you talking about now?

MR. SHEPARD: Talking about before 1974.

MR. BIRD: At any time before 1974.

BY MR. SHEPARD:

Q. Uh-huh. Yes.

A. I guess I would have to say that I had read things about oxygen and feed, yes. I had read a few things.

Q. And what was your understanding of the effects of excessive amounts of oxygen on feed?

A. That when oxygen came in contact with feed that [p. 115] there would be some spoilage.

Q. What did you understand about how the use of the cement stave silo reduced spoilage in the corn silage?

MR. BIRD: Objection. That assumes that he had an understanding, so I don't think there is any foundation. You can go ahead and answer it, if you feel you can.

THE WITNESS: Repeat the question.

BY MR. SHEPARD:

Q. Okay. I thought you testified earlier that one of the reasons you put the corn silage in the stave silo was to reduce spoilage.

A. To do what?

Q. To reduce spoilage.

A. No. We put it in there because that was the only, that was one of the silos we had.

Q. Did you understand that one of the reasons for putting the corn silage in the stave silo was to reduce spoilage?

A. I'd have to say vaguely that the -- you'll have to repeat the question.

Q. I'm just trying to get a sense, did you understand that one of the benefits of using a stave silo to store corn silage was to reduce spoilage in the [p. 116] feed?

A. No. I could use any silo. I mean, we had the clay block one too. Didn't have to be just the cement one.

Q. Well, I mean, did you understand -- was there ever a time when you just stored corn silage in a pile on the ground?

A. We've done that a few years, yes.

Q. How did you do that?

A. Elevated it to a pile and tried to compact it around, compact it, walked on top of it, packed it down and feed some off it.

Q. What was the purpose of packing it down?

A. I guess to make the pile look nice and to keep the oxygen or air from getting in there.

Q. And what was the reason you wanted to keep air from getting in there?

A. I guess because of the spoilage. The tighter you had it compacted, the better the feed would be, the longer it would last.

Q. And you understood that the better you were able to reduce the amount of oxygen to the feed, the less chances there would be that you'd have spoilage.

A. Yes.

Q. When you stored the corn silage in the piles that [p. 117] you were talking about, what would happen, what did the feed on the very outside of the pile look like? What would happen to the feed on the outside of the pile?

A. We'd get some mold across the top.

Q. And what did you do with that feed on the outside of the pile?

A. We usually threw it away.

Q. And why did you throw it away?

A. Because we felt that it didn't belong to the animals, that they'd probably get sick from it.

Q. How many years did you store the corn silage in piles like that?

A. Two or three years.

Q. Do you remember when that was?

A. I have no idea.

Q. Sometime before 1974?

A. Oh, yeah. I was quite small when my dad used to do that.

Q. Was the use of those feed piles something that you ever did after 1969 when you were on the farm?

A. I cannot recall.

Q. Was there a reason that you didn't store feed that way after 1969?

A. I believe we had enough silage space at that time [p. 118] that we didn't have to put it out there.

Q. Was there a reason that you preferred to put your corn silage in one of the silos rather than storing it in a pile on the ground?

A. Convenience and to stop spoilage.

Q. So you had less spoilage in the stave silo than you did in the piles on the ground?

A. Oh, yes.

Q. And is that because there was less opportunity for oxygen to have access to that feed?

MR. BIRD: If you know.

THE WITNESS: I couldn't answer that.

BY MR. SHEPARD:

Q. Before 1974 when you were storing corn silage in the stave silo was there ever a time when you saw any sort of mold or spoilage on the top of the feed?

A. Yes, we did see some.

Q. When would you see the mold or the spoilage on the top?

A. Well, our program then was we fed the cement stave silo first in the fall. The red silo was tarped, filled and then we put a tarp over it. And then in the spring we would open that silo up and start feeding out of that red silo when the other one was [p. 119] empty. And when we removed the tarp there was some spoilage, some spoilage.

Q. Why did you put a tarp over the top of it?

A. Well, we heard at the time that that would prevent some of the spoilage.

Q. You understood that the spoilage on the top of the red clay silo was from the access of oxygen to that top layer?

A. Yes.

Q. And how was the quality of the feed -- strike that. What did you do with that top layer of feed when you began feeding out of the red clay silo?

A. We threw it down the chute and it was all hauled out into the field.

Q. How much would you take off the top and throw out?

A. It would vary. Maybe a foot, maybe some years two feet. I'd like to ask for a break, if possible.

Q. Sure. Let's take a short break.



(Brief recess.)

BY MR. SHEPARD:

Q. Mr. Klehr, when you talk about the feed, the corn silage that you threw out from the top of the red clay stave silo, can you just tell me what that feed looked like that you threw out?

A. It was moldy and very black and mushy.

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A. [p. 123] Yes.

Q. And it had that same pickled smell?

A. Yes.

Q. And was that generally true, what you've just described, each year from 1971 until the present?

A. Yes.

Q. What was your understanding of how the feed at the very end of the fill was becoming moldy?

MR. BIRD: Understanding when? That he learned over the years?

BY MR. SHEPARD:

Q. Yeah.

A. I believe that maybe at the end there was a little oxygen getting in or something that created the mold a little bit.

Q. What was your understanding as to how the oxygen was getting into the corn at the end of the feedstack?

A. I would have to believe through the unloader. It's the only thing that it could get in.

Q. And was that something you -- well, let me strike that. Did you understand, before 1974 did you have any understanding of -- well, strike that. What was your understanding before 1974 of the relationship between feed quality and animal [p. 124] performance?

A. Well, I knew that good feed made healthy animals.

Q. And what was your understanding of the effect of feeding bad feed to your dairy animals?

A. Before what year?

Q. Before 1974.

A. What I know now or what I knew then?

Q. What you knew at the time.

A. I guess I knew very little at the time. We never fed bad feed to the cows before then.

Q. And instead when you saw bad feed you would throw it out and not feed it to the animals?

A. Yes.

Q. Why did you do that?

A. I don't know. It was just a policy that we've always -- my dad, I guess, it was just the way I was brought up.

Q. Well, would it be fair to say that you were concerned that feeding that kind of feed would not be good for the animals?

A. Yes, I guess that would be fair to say.

Q. Were you involved at all in the purchase of that 1955 silo, the 17 by 40?

A. I was 11 years old. I don't believe my dad asked me too much at that time.

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Q. [p. 131] Well, were you aware of any kind of valve up there?

A. Well, I knew the breather bag had to have somebody up on top of the roof, some vent or some outlet.

Q. What was your understanding of the vent or the valve -- well, let me ask you this: Were you aware of a valve on top of the 17 by 40?

A. That went to the breather bag? Yes.

Q. Okay. What was your understanding of the way the valve worked that was on the 17 by 40?

A. That air passed through that valve and went into the breather bag, in and out.

Q. Other than your DHIA records, are you aware of any farm records that would show how many cows you had in your dairy herd at any point in time, say, before 1976?

A. DHIA records I would believe would be the only ones.

Q. Do you know whether or not you have any feed tests that relate to the feed stored in either of the Harvestore silos, other than your very most recent feed tests?

A. I believe that that is all I have.

Q. You just have the most recent ones?

A. Yes.

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A. [p. 135] Yes I did.

Q. Tell me what else you looked at other than the Harvestore.

A. We inquired about the cement stave silos.

Q. When you say we, who do you mean by we?

A. My wife and I.

Q. Who do you recall speaking to about cement stave silos?

A. Well, I had a lot of -- I mean, I guess some neighbors, but I had a lot of experience with cement stave silos over the years myself.

Q. Which of your neighbors did you talk to about stave silos?

A. Right offhand, I couldn't tell you.

Q. Do you recall what you spoke to your neighbors about at that time?

A. I guess I went over there and looked at their haylage that was coming out of the silos, the feed, the feed that was coming out.

Q. That was coming out of their stave silos?

A. Yes.

Q. And do you recall speaking, asking those farmers questions about their feed?

A. Yes, I can remember.

Q. Do you recall anything specific about the

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[p. 137] you were looking at in terms of whether they were top unloading or bottom unloading?

A. They were all top unloading.

Q. Do you remember anything that Mr. Von Bank told you about the cement stave silos you were looking at?

MR. BIRD: Other than the price, you mean.

BY MR. SHEPARD:

Q. Right.

A. I believe we went with him a day and toured a few farms. And I guess they showed me the quality of the feed they had coming down.

Q. And do you remember when you went on this tour with Mr. Von Bank?

A. I believe it was in early '74.

Q. Where did you go?

A. I do not know. It was out in Carver County somewhere.

Q. How many farms did you go to that you recall?

A. I'd say two, at least.

Q. Did you talk to the farmers on those farm tours about their feed?

A. Yes.

Q. Would it be your recollection that the two farms that Mr. Von Bank took you to had the same make of [p. 138] silo that he was interested in selling to you?



A. Yes, I believe that.

Q. Did you contact Mr. Von Bank to tell him you were interested in purchasing a silo?

A. Yes, I believe that.

Q. How long did you spend on the farm tour with Mr. Von Bank?

A. Maybe a half hour, 20 minutes to a half hour on a farm.

Q. Did you have an opportunity to ask questions of the farmers on those farm tours?

A. Yes, I had the opportunity.

Q. Did you have the opportunity to ask them whatever you felt you wanted to know about the operation and use of their stave silos?

A. Well, they had experience with chopping of hay and this and that, and it looked like the type of thing that I wanted to go to. We looked at the quality of feed. It did not look bad. I thought it was good feed.

Q. The quality of the feed looked good to you?

A. Yeah.

Q. Did the farmers indicate to you that they were happy with the quality of the feed?

A. Yes, I'd say so. Yes.

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[p. 146] that would be most of them.

Q. Before you talked to Mr. Deutsch had you gathered any information at all about Harvestore silos?

A. Well, yes, I had gathered information. We had experience with the one on the farm and I was very interested in the Harvestore.

Q. Had you talked to any neighbors or people that you knew that had them, the way --

A. Before I talked to Mr. Deutsch?

Q. Yeah.

A. I have to say no.

Q. But from your experience using the Harvestore 17 by 40 on the farm, you were interested enough to look into buying another one?

A. Yes.

Q. I understand you don't recall what was said at the first conversation or the first meeting you had with Mr. Deutsch. Tell me as best you can what you first recall being said at any of those meetings you had with him leading up to the purchase of the silo.

A. Well, I'm sure the first visit was a get-acquainted visit. I'm sure some information was dropped off, conversation was probably done for a few minutes or so,

and then I would assume that maybe a week or so [p. 147] later he called back or contacted me back.

Q. Do you have a specific recollection that Mr. Deutsch gave you any literature at that first meeting?

A. Oh, I would definitely say yes.

Q. Do you remember that as you sit here or is that just what you assume?

A. I'd say yes. Absolutely yes.

Q. You definitely remember him giving you literature at that first meeting.

A. Almost every time he dropped off literature.

Q. Do you recall specifically what advertisements or literature he gave to you at that first meeting?

A. I could not recall.

Q. Do you recall when the next meeting with Mr. Deutsch took place?

A. I do recall him coming into the house in the kitchen. Mary and I sat by the table and we discussed things. He had a movie projector with him. There was a lot of conversation. I'm not saying this was the second visit or the third visit; it was in this time period. A lot of literature was left with us, and I believe that Mary and I looked at the movie after he left.

Q. This particular meeting you're talking about at the

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[p. 149] at those meetings before the meeting where you sat around the kitchen table with him.

A. Well, I know that once we left him in the house with the movies and the conversation that there had to be a lot of other contact with him and the conversations that were said was more production, more convenience, less protein, absolutely less protein, easier putting it up, which would fall under convenience, bottom unloading, which was a big advantage, Mr. Deutsch said. We could fill and unload at the same time, where with the cement stave silos we had to crank the unloader back up.

And Mr. Deutsch never had nothing good to say about the cement stave silos because of the disadvantage of cranking the unloader up all the time. And he told me several incidents of farmers who crawled up those silos and they went up and down in that dust and they said they had gone to hell. I mean, they thought if you ever lived in hell, it was crawling up and down those hay chutes because of the dust that accumulated in there. And so it was a deciding factor of the Harvestore.

Other conveniences, I guess I'd have to -- we'd have healthier cows. It was mentioned we'd have better milk production. Easier to get [p. 150] out in the field and chop it at an earlier stage, could make the haylage early. All those things seemed to come to the bottom line that we'd be making more money. And that they would pay for themselves.

Q. Are those representations that you've just told me about all of the representations you recall Mr. Deutsch making to you before you purchased the silo?

A. I'm sure there was more.

Q. Are there any more that you recall other than what you've just mentioned?

A. That oxygen did not come in contact with the feed. And with my experience of oxygen coming in contact with my feed over the years, I knew that that would be a big advantage. And there would be less spoilage; that you could mix any crop, one on top of the other, didn't make any difference. I believe at this point that covers most of them. I can't think of more offhand.

Q. Are the representations that you just told me about things that Mr. Deutsch told you about over the course of several discussions with him?

A. Yes.

Q. Let me just go back through the list and ask you [p. 151] some questions about some of the things you've mentioned. The first thing I have written down here is more production. Did Mr. Deutsch give you any sort of explanation as to why you might expect more production?

A. Because of the better quality feed that we would get out of the silo.

Q. Did he tell you why you might expect to have better quality feed coming out of the Harvestore?

A. Because oxygen did not come in contact with the feed.

Q. Do you recall anything else that he told you with respect to this item of more production?

A. Well, the better feed would make healthier cows and healthier cows made more milk. And you could put up your haylage at an earlier stage, save more protein or save more leaves, which would give you better feed quality. The first in/first out was an advantage, because you don't have this changing of rations always. All these things would give you more production.

Q. The next thing I have written down here that he told you was that there would be more convenience. And I believe that you -- I wrote down here just about as much of what you said as I could. Let me

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[p. 153] that was always a problem, somewhat of a problem, with top unloading, and that you would not have that problem. And in the wintertime the cows would consume more feed because it was not just frozen feed that you were feeding them. It would be warm feed.

Q. And did he tell you why you could expect to have warm feed?

A. Well, because you're underneath the pile, you're inside of the pile and not taking off the top every day.

Q. The next thing I have written down on my list here is that you could fill and unload at the same time, and I think



you've told us about that. Was there anything else that you haven't already mentioned that Mr. Deutsch told you about your ability to feed and unload at the same time?

A. No. I would say that would be, pertaining to that subject, that was all.

Q. And am I correct that that feature, the ability to feed and unload at the same time, was one of the conveniences that Mr. Deutsch was telling you about?

A. Yes. That was one of the conveniences.

Q. And the same with bottom unloading? Was that one [p. 154] of the conveniences he mentioned?

A. Yes.

Q. The next thing I have written down here has to do with healthier cows. What did Mr. Deutsch tell you about healthier cows?

A. Well, he said if you get the feed, by putting it through a Harvestore you were able to put it up at a much younger stage, save all the leaves. You'd have a much better feed quality, and with a better feed quality you're going to have a healthier cow.

Q. So am I correct that you understood from what Mr. Deutsch was telling you that healthier cows was one of the results you could expect from having better feed?

A. Yes. I would say that that would be true, yes.

Q. We already talked about better production. The next thing I have written down here that you said was that it would be easier to chop the alfalfa at an earlier stage and you could make haylage earlier. Is that what he told you, as best you recall?

A. Well, what we talked about was basically that with the Harvestore that you could get out there earlier, cut the stuff at an earlier stage, prebud stage, gather that, get the highest protein. And [p. 155] by saving, by chopping a little bit earlier and saving the leaves you would have more protein. That was the big advantage.

Q. And when he was talking about being able to chop at an earlier stage, was he comparing your ability to make haylage for the Harvestore with dry hay, baling hay?

A. Repeat that question.

Q. That's a terrible question. I apologize. When he said that you would be able to chop the alfalfa an earlier stage and make the haylage earlier, what was he comparing that to?

A. To baled hay.

Q. And because you were making haylage instead of baling hay, he told you that you would be able to save more of the leaves from the alfalfa plant?

A. Yes.

Q. And, therefore, you would get more protein than if you were baling hay?

A. Yes.

Q. The next thing I have written down here, and this is kind of a paraphrase, but you said the bottom line was that you would be making more money and that the silos would pay for themselves. Is that accurate?

A. [p. 156] Yes.

Q. Did he explain to you why you might expect to make more money?

A. Because of the better quality feed and the less protein that I would have to buy and more milk.

Q. Did he explain to you why you could expect the silos to pay for themselves?

A. He showed us on paper as to how they would pay themselves off by saving -- by the increase in production and the savings on the protein he could prove to us that it was a profitable thing.

Q. And the increased production and lower protein that he talked about was, as you understood it, because you could expect to have better feed from the silo?

A. Yes.

Q. The next thing I have written down here is that he told you that oxygen would not come in contact with the feed. And then I believe you said that you knew that that was a big advantage based on your experience with oxygen contacting feed that you had experienced on the farm, or something to that effect. Is that correct?

A. Yes. Yes.

Q. And the next thing I have written down here has to [p. 157] do with less spoilage. And am I correct that -- well, let me ask you the question this way: Did he tell you why you could expect less spoilage from a Harvestore?

A. Because it was an airtight structure. The air did not come in contact with the feed. And my experience was that with that you would have less spoilage.

Q. And that was because you had experience on the farm where you had observed spoilage from the contact with oxygen.

A. I had seen spoilage on the farm before, yes.

Q. And that was before 1974.

A. Yes.

Q. The next thing I have written down here is that you could mix crops, one on top of another. Tell me what he told you specifically with respect to that.

A. Well, as far as you could fill silo and the following crop or if it was hay, again, you could put right on top of the next one. And if there was some corn silage or something that you wanted to put in between there, that you could put that on top and go right back into haylage again. I guess that would pretty much cover it, that you could [p. 158] keep on mixing, I mean, putting different varieties of forage in the same silo.

Q. You mentioned, when Mr. Deutsch told you the silos would pay for themselves, that he did some sort of projections for you.

A. Yes.

Q. Do you have those figures that he produced for you?

A. No.

Q. Did you save them?

A. No.

Q. Do you recall specifically what he told you with respect to the ability of the silos to pay for themselves?

A. He said in four to five years that we should be able to pay the silo back. It would pay for itself.

Q. When you were talking to Mr. Deutsch about all of these things, had you and Mr. Deutsch, were you talking about a specific size and specific model Harvestore or were you just talking generally at this point?

A. I would believe at this point it was just generally.

Q. He was just talking about Harvestores generally?

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[p. 166] closed the thing up and then they air checked it with sealers. Guys would check every seal, every bolt. It was put tog ether with very good craftsmanship. I liked that part. I seen several movies - I don't know if that one --

I think that would probably be basically the end of that movie.

Q. Who was present with you when you looked at that --

A. Mary and -- excuse me. Mary and I.

Q. Was Mr. Deutsch present for that, when you looked at it?

A. Okay. I do not think he was.

Q. Is that everything you remember about what you saw in the movie?

A. Yes. I would say in that movie, yes.

Q. Did you have any questions after you saw that movie that you asked Mr. Deutsch?

A. Well, I would assume that we talked about the foundation, the footing, as to how many yards of cement it was going to take. And I guess that at the end the finished product would be that it would-be tested so that I would know I had an airtight silo, because I was very concerned about that.

Q. Why were you concerned about that?

A. Well, that was going to be my big factor, that I [p. 167] could keep this oxygen out of my, coming from contact with my feed.

Q. And why were you interested in doing that?



A. To eliminate spoilage.

Q. Did Mr. Deutsch answer any questions you had about the movie after you saw it?

A. I'm sure he answered all the questions that I had, but I can't remember all the questions that I asked him at that time.

Q. Do you remember anything he told you about anything that was said in the movie after you saw it?

A. I would say not.

Q. Do you remember when it was that you first saw this film, Birth of a Harvest?

A. The summer of '74.

Q. Have you seen that film since that time at all?

A. Yes, I have.

Q. When have you seen it since then?

A. In my lawyer's office.

Q. Is that the only other time you've seen it?

A. And I seen it recently in our own house.

Q. When did you look at the movie at your own house?

A. About a week ago.

Q. Was that before the weekend, this past weekend, or since then?

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[p. 169] They showed people cutting hay and then running with the choppers and blowing it into the silos. And they showed the, talked about the early stage of cutting and they talked about all the protein you're going to save. And the protein that you saved was going to give you better feed and the better feed was going to make healthier cows. Wouldn't make them, but you'd have healthier cows. And healthier cows meant more production, more production meant more income, more income meant better living.

Q. And were all those things that you saw in the movie important to you?

A. Yes. I'd say the whole movie was very important to me.

Q. The parts of the movie that showed the progression, as you say, to chopping alfalfa rather than baling it and moving to automation, those sound like things that you were interested in based on what you told me earlier about your desire to put up another silo to help you expand. Would that be accurate?

A. What silo are you talking about?

Q. Well, I thought you told me earlier that when you decided in 1974 that you wanted to buy another silo

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A. [p. 176] It was The Magic of -- no.

MR. BIRD: Here, it's on your --

THE WITNESS: I get the names mixed up. The Magic of the Harvestore Storage.

BY MR. SHEPARD:

Q. Where did you see that film before?

A. And I believe I seen that one in New Prague, or one of the Harvestore meetings that they had.

Q. When you talk about the Harvestore meetings they had, what are you referring to?

A. At least once a year they'd invite us up there. It was sort of a winter thing, but I think it was an educational thing. They kind of updated us on how to educate us on how to keep putting up good haylage and all these things. And if they had any new items that they sold and they always had a dinner with it and we always got a card and invitation to come up.

Q. How many years did you and your wife attend the winter meetings?

A. Mary never went too often to the winter meetings. I usually went. She might have gone to one of them. We went many years, I mean before and after.

Q. You went many years?

A. Yes.

Q. [p. 177] Did you make an effort to go to the annual meetings at New Prague every year?

A. Well, I made an effort, yes I was excited about Harvestore and, yes, I would say I made an effort. Not saying I made it every year, but yes, if --

Q. Can you give me an idea how many of those meetings you believe you attended from 1969 to 1972? Or 1992. I'm sorry. From 1969 up to the present time.

A. Half a dozen.

Q. How many of those meetings did you attend before 1974 when you bought the silo?

A. I'd say one, maybe two.

Q. At the winter meetings would there be a speaker or someone who would come in and talk about things?

A. Oh, yes. Yes.

Q. What do you recall was discussed at those meetings, at the two meetings that you attended before 1974?

A. Well, they discussed the advantages of the Harvestore.

MR. BIRD: Now you've got him at two meetings. He said one to two.

BY MR. SHEPARD:

Q. Do you remember whether there was one or two before 1974?

A. [p. 178] One for certain, possibly two.

Q. Okay. Whether you were at one meeting or two meetings before 1974, tell me what you recall about what was discussed at those meetings.

A. The advantages of the Harvestore system, the oxygen-limited structure and how it all worked and how the oxygen stayed out of that silo. It was an airtight structure.

Q. Was there ever a speaker who would come and talk to the group?

A. Yes.

Q. Was that a farmer or was it someone from the industry or who spoke at the meetings?

A. Many times they had farmers or current owners of Harvestores. And I would -- A. O. Smith personnel.

Q. Do you remember who spoke at the one or two meetings that you attended before 1974?

A. I cannot remember the names of anybody, no.

Q. Do you recall whether or not it was a farmer, another farmer, Harvestore owner, who spoke at the meeting?

A. I know that just about every meeting, even later on, there always was some Harvestore, some happy Harvestore owner that talked.

Q. Do you remember who any of those happy Harvestore [p. 179] owners were that spoke at the meetings?

A. I know Ben Zweber talked at one of them.

Q. Do you remember when you first heard Ben Zweber speaker at one of those meetings?

A. That was after the purchase of the silo. I'm not going to say the year. I'd say a couple years afterwards.

Q. Do you remember anybody else other than Ben Zweber who came in and spoke to the group at those meetings?

A. No.

Q. Was he the only person that you recognized or knew?

A. He was the only one that I knew by name. But there was many people there from the company.

Q. Had you known Ben Zweber before you saw him speak at that one particular meeting?

A. Yes, I knew Ben Zweber.

Q. How did you know Ben?



A. Well, Ben and I don't live that far apart, and I guess Ben was probably one of the first guys who had a lot of Harvestores, and so I guess we kind of envied Ben. We thought Ben was a good farmer. And so over the years, I guess, before even -- I've known Ben for quite a few years.

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[p. 181] the haylage he was getting from the Harvestore?

A. That was the impression I got.

Q. Did he indicate to you that he was satisfied with the way the silo worked for him?

A. Yes. That's the impression I got.

Q. Did you get a chance to look at the haylage that he had coming out of his silos?

A. Yes.

Q. What did the feed look like?

A. Well, it was a lighter green, greenish -- I shouldn't say light green, but it was sort of a greenish colored haylage.

Q. Do you remember anything else about how the haylage looked?

A. How it looked?

Q. Yeah.

A. It looked like, at that time I didn't know that much about haylage, but it looked like haylage to me.

Q. Do you remember Ben Zweber telling you anything else about the haylage that he had on his farm?

A. I'm certain he mentioned the protein and the quality of haylage he had. Yes. I guess that would pretty much cover it as to quality that he had.

Q. [p. 182] What did he tell you about the protein in the haylage that he had?

A. Well, he was very much satisfied with the high protein level that he could obtain over baled hay that he used to years ago. He used to bale hay, and he was very satisfied with his Harvestore.

Q. And did he indicate to you that the protein level in his haylage was greater than the level of protein in his baled hay?

A. That was the impression I got, yes.

Q. Do you remember anything else that you and Mr. Zweber discussed when you went to his farm?

A. We had talked about, he had just gotten a Heston self-propelled swather from the Heston company that they wanted him to try out. And it was sitting in the yard, he had just gotten it that day. That's why I can remember the visit, because it was sort of like a demonstrator that they wanted him to try out. And so I know we talked about that self-propelled swather that was sitting there.

Q. Did you believe that what Mr. Zweber was telling you was true about his experience with the Harvestore silo?

A. Well, what Mr. Zweber was telling us was basically the same thing that I had read in the articles and [p. 183] seen on the movies, that this was almost, basically I would have oxygen limited and oxygen would not come in contact with the feed and that I would have better feed value and healthier cows, more milk and more income.

Q. And those were all things that Mr. Zweber told you?

A. What he basically told us that day was the same things that we had pretty much gone through in the literature my wife and heard or read.

Q. How long did you spend talking to Mr. Zweber that day you went to his farm?

A. Half hour, 45 minutes.

Q. Did you have the opportunity to ask him whatever you wanted about his feed?

A. Yes.

Q. Did you ever talk to Mr. Zweber after that particular farm tour in 1974?

A. I've talked to Mr. Zweber several times. Many times, several times.

Q. Since 1974?

A. Oh, yes.

Q. What have you talked to him about since then?

A. Well, he has been out to my farm several times trying to have me switch my, shipping my milk to, from the creamery we are to the NFO creamery that

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A. [p. 187] At that time, yes.

Q. Can you give me an idea of how many twisted stomachs or how frequently you had them in the herd?

A. We never had a twisted stomach before we went to Harvestore. I never, my dad and I never knew what a twisted stomach was.

Q. So you never had one until 1974?

A. I would say that's very correct.

Q. Between 1974 and the date when Mr. Zweber called you, how frequently did you have twisted stomachs in your herd during that time period?

A. I'd say maybe two a year.

Q. Did you consider that to be an unusual number of twisted stomachs to have in a herd of your size?

A. I guess at that time I didn't give it that much -- listening to the vets and everything, I think it was just an average herd. I think a lot of people were having twisted stomachs that were feeding the chopped feed. That seemed to create more of a problem.

Q. So during that time would I be correct in saying that you do not think you had any sort of an unusual problem with respect to twisted stomachs for a herd of your size?

A. [p. 188] Before what time?

Q. Before you talked to Mr. Zweber.

A. I'd have to say I'm sure it was a concerned problem. I don't know what is a lot and I don't know what is many. I guess none is good, but a few of them -- it's hard, without looking at my records, I can't say if that was an exceptionally large number compared to years later on as we went along.

Q. When you first experienced twisted stomachs in your dairy herd what did you do about it?

A. Well, the first ones, the veterinarian used to tell us, we tried rolling them. At first they didn't operate on them as much as they did later on. We tried rolling them. And I guess some of them we did have good success with and some of them we didn't.

Q. You're talking about actually rolling the --

A. Animal over.

Q. And trying to get the stomach to untwist?

A. Yes.

Q. Did you talk to your veterinarians about that?

A. They were there at the time when we rolled them. They showed us how to do it at first.

Q. What did they tell you about the cause of the [p. 189] twisted stomachs?

A. I'd --

MR. BIRD: Wait a minute. What are you talking about? Way back then?

MR. SHEPARD: Yeah.

MR. BIRD: At the time he first had the DAs?

BY MR. SHEPARD:

Q. Right.

A. I guess the first time, I don't think we talked about it, as to how they got it. Just was something they had.

Q. At any point between 1974 and the time Mr. Zweber called you in or around 1982, did you ever talk to your vets about what might be causing the twisted stomachs?

A. Yes.

Q. When do you first remember talking to your vets about the cause?

A. I can't remember when I first talked to them, but it was -- I can't pinpoint any date to it.

Q. Which vet do you recall speaking to?



A. Dr. Mittelsted was our vet then.

Q. Mittelsted?

A. Yeah. Dr. Mittelsted.

Q. [p. 190] What did Dr. Mittelsted tell you about the twisted stomach?

A. He used a stethoscope to find out what side it was on and he showed us how to roll them. And I don't believe Mr. Mittelsted ever performed an operation on them. As far as conversation with him, I do not believe that it was ever mentioned as to what was causing this at that time.

Q. So you never talked to Dr. Mittelsted about what was causing the twisted stomachs?

A. Not the earlier ones, no.

Q. At some point did you talk to him about it?

A. Yes. I would say somewhere down the line it was talked about as to the feed being chopped too fine.

Q. When did you talk to him about that?

A. I couldn't say the year. I wouldn't know.

Q. Was it before your conversation with Mr. Zweber?

A. Oh, yes. I'm certain it was.

Q. And he told you that the twisted stomachs were caused because the feed in the Harvestore silo, the haylage was being chopped too fine?

A. Well, something, it had to do with the fine chopped feed, yes. That was my understanding as to what was causing it.

Q. And did he tell you that it was being caused by [p. 191] something related to the Harvestore feed?

A. He didn't specifically say the Harvestore feed, I guess. He just said chopped feed.

Q. Did you talk to any of your other veterinarians about the cause of the twisted stomach?

A. Well, he was my veterinarian for quite a few years. Then he passed away and we went to another vet, and by that time we were pretty well informed as to twisted stomachs and what to do with them.

Q. What did Dr. Mettelsted tell you to do to help prevent the problem?

A. To feed them some long-stemmed hay. A slice of hay, long-stemmed hay would be good for them.

Q. Was that something you had been doing up until that time?

A. Well, we were feeding some long-stemmed hay. We always did. But he advised us that was an advantage.

Q. And that you should keep doing that?

A. Yes.

Q. When you talked to Mr. Zweber on the telephone when he called you, did you tell him all that information?

A. No. He just asked, he didn't ask me for that. He asked me if I was having a lot of problems. And in

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[p. 200] going to have to have him read this thing from cover to cover.

MR. BIRD: Well, I mean, all I'm saying is if you're going to ask him detailed questions similar to what you did with the other document, I don't see any way around it other than to have him read it. But if you want him to do a general broad-brush, I think that's easier as long as it's understood that that's what he's doing as opposed to nitpicking each page. I think we ought to have that understanding. That's all.

BY MR. SHEPARD:

Q. Okay. Let's do that. Mr. Klehr, first of all, do you recall seeing this document anytime before you started the lawsuit in 1991?

A. Yes, I do.

Q. When did you first see this?

A. This was before 1974.

Q. How did you get that document?

A. This was in our house.

Q. Do you remember how you got it in your house?

A. Well, my dad had a Harvestore and he left all farm operating equipment books for any equipment that he bought, that stayed with the farm.

Q. So am I correct this document was left in your

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[p. 202] structure, the air is drawn into the breather bags." That was very interesting.

BY MR. SHEPARD:

Q. You're reading from the paragraph down in the lower left-hand corner?

A. Yeah. I'm sorry if I didn't --

Q. Yeah. I just want to make sure it's clear.

A. And the first sentence, "The Harvestore system is much more than a silo. It is an advanced system of storing and processing livestock feed."

Q. Why was that statement at the top of the page significant to you?

A. Because I was, at this point I was comparing two silos. I was comparing a cement stave silo to a Harvestore unit.

Q. And what did this particular statement lead you to believe that was important to that comparison that you were making between the Harvestore and other forms of storage?

A. Because of their advanced technology they were going to keep the oxygen out of the feed. It was an oxygen-limited structure.

Q. And with respect to the paragraph at the bottom of the page about the oxygen-limited storage, why was that information important to you?

A. [p. 203] Because it says here that the advanced system, so in other words, they had done a lot of engineering already on this thing. Advanced means that they were ahead of times.

Q. Well, let me ask you this question: Down at the bottom where you talk about, it says, "The primary design feature that makes oxygen-limited storage possible," what was it about that particular paragraph that was significant to you? Why was that information important to you?

A. Because they talked of the breather system, of the air not coming in contact with the feed.

Q. Why was that important to you?

A. Because of the experience I've had on the farm over years and knowing what air with contact with feed would do.

Q. What did you know that air contacting feed would do?

MR. BIRD: Object. You've already gone over this, Counsel. This is like the third time you've asked him that very same question.

MR. SHEPARD: Well, they're his words.

MR. BIRD: Well, I'm going to object. You've already covered this area. You've already asked him these questions about oxygen getting to

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[p. 208] nutrition growth, wilt to 35 to 55 percent moisture, chopped at a fourth to three-eighths inch cut and process through a Harvestore."

I always felt by chopping it a little bit sooner than -- at 35 to 55 sure beats the baled hay, and I could save a lot more protein there. My baled hay, I had to wait to 29, or from 25 to 30 percent moisture.

Q. You had to wait until it was 25 to 30 percent moisture before you cut it?

A. Well, no. Before I could bale it. The baling end, I had to wait a lot longer. It probably was in the 20 to 25 range with baling, maybe 30.

Q. Okay.

A. Page 27, "The best assurance of profitable haylage is to cut it at the right time, let it wilt, chop it fine. This gets as much as possible of the protein rich alfalfa or other legumes or grass leaves and fine stems into the Harvestore



structure. Purchase of costly protein supplement is greatly reduced or eliminated."

(Pause.) And on page eight. The first paragraph, "There is a old saying that any line of products is only as good as the service behind it. A.O. Smith Harvestore is proud of the U.S. and

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A. [p. 211] Okay.

Q. Do you recall seeing this document before the lawsuit was started in 1991?

A. Yes.

Q. Do you recall when you first saw it?

A. This I seen after I, after 1974.

Q. Do you remember when you first saw it?

A. I could not tell you the year.

Q. Do you remember how you obtained a copy of the document?

A. I'm sure through the mail.

Q. Do you remember who mailed it to you?

A. Well, I would imagine -- well, maybe A.O. Smith, or MVBA. Either one. It's hard to -- it's fairly vague what you're looking at. It's a faded color.

Q. I appreciate the fact that the photographs don't reproduce very well. Can you tell me what, if anything, in this document was important to you?

A. Well, page seven.

MR. SHERAN: Excuse me. Did he say he saw this before or after 1974?

MR. BIRD: After.

THE WITNESS: After. About "Our breather bags work over a wide temperature range." Page seven. "The Harvestore breather system [p. 212] protects feed from oxygen throughout the normal daily range of temperatures experienced in most parts of North America."

On page 16 they talk about the construction of the silo and how "Bolts are inserted where sheets overlap and tightened with speed wrenches. Then they're set to A.O. Smith specifications with hand torque wrenches."

And they show a picture of the bolts and the sheets overlapping as the bolts are tightened. Sealants flow around them "to create a sound joint that will resist leaks for many years."

Q. Why was that important to you?

A. Well, these are things I read after I bought the silo, but it was, I guess, updating information that I had read previously.

MR. BIRD: Wait a minute, now. Look through the whole document. He's asking -- you want him to read this whole document, carefully?

MR. SHEPARD: No. I mean, I just want to know

MR. BIRD: Well, he's closing the book before he even looked at all the pages. And I want to make sure that if you're going to hold him to this that I want him to read the whole thing

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[p. 218] any business."

Q. Let me back you up to page two, the article there that's entitled Haylage Boosts Top Production Even Higher. Was there anything specifically in this article that was significant to you, or was it simply of interest to you that there was an article here about a dairyman whose milk production was apparently projected to hit 20,000 pounds?

A. I guess right now I would have to say it was the article as to those guys increasing their production with the Harvestore system.

Q. Okay.

A. There is another story on page six of a successful farmer, a story of how they increased their production with -- by going to the Harvestores they could reduce the corn silage and put up more haylage and save on protein.

On page six, the oxygen-limiting storage makes top quality feeds. There they have the moon and the sun. And under oxygen-limited, about two-thirds of the way down it says, "Feed storage made possible by Harvestore's time-proven breather bag system described at the right minimizes feed losses from oxidation, mold and other enemies of feed quality. Anaerobic bacteria initiate a

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[p. 220] the safest place to put money, the Harvestore is the most secure repository for valuable grain and forage crops. And just like the bank, the Harvestore can pay big dividends in increased return per acre, greater feeding efficiency and reduced labor requirements.

"These benefits are inherent in the Harvestore because it is truly a system, a system designed to solve the major problems of on-farm feed handling which have troubled farmers for centuries."

Q. And what was it in that particular part of this document that you thought was important?

A. It's a good investment.

Q. Okay.

A. The center fill tank, on page seven, "When you fill with a PTO-powered blower, the Harvestore center fill pipe assures that grain or forage follows the proper flow path for best performance.

"When feed drops directly into the structure's center, your Harvestore unloader works most efficiently to assure smooth, uninterrupted feed flow throughout the year."

Q. And what was it about that aspect of the document that you thought was important?

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[p. 229] Are you ready to give an answer on something?

THE WITNESS: Yes. I'd like to have your attention. On page four in Exhibit 6, What Is a Harvestore? In about the middle of the page.

BY MR. SHEPARD:

Q. Can I see where you're looking? Okay.

A. "A Harvestore system is more than a silo. It's an entirely new concept of feed management. Because of its durable construction, oxygen-limited environment and bottom unloading features, it gives the farmer nearly complete control of his feed management allowing him to harvest and store his crops for maximum nutritional value and to feed them when and how he desires. The Harvestore farmer is no longer at the mercy of the whims of nature and the economy.

"Glass fused to steel construction is a basic key to the success of the Harvestore design. The heavy steel plates that make up a Harvestore are coated on all sides with a tough layer of cobalt blue glass fired in 1,600 degrees Fahrenheit to create a firm bond between the steel and the glass."

Q. Okay.

A. [p. 230] And then the top paragraph on the same page to your right, "To prevent spoilage of feed while in storage, the Harvestore system is designed to provide an oxygen-limited environment. Without ready access to air, mold, oxidation and destructive bacteria are unlikely to attack the feed and destroy its nutritional value and palatability.

"To prevent the entire oxygen, each Harvestore plate is joined at the edge with durable sealer and securely bolted to its neighbors. The Harvestore bolts -- there are more than 11,000 of them in a 25 by 80 Harvestore -- have rounded plastic-capped heads on the inside of the unit to resist corrosion and maintain a smooth surface. On the outside nuts are precisely tightened and torque wrenched during construction."

I relied heavily on the oxygen-limited breather system that they had.

Q. Okay. And we've already talked about the reasons for that, is that right?

A. Yes. It seems that every page, or many pages in these books always talk about the oxygen-limited. I guess it's all over. Wherever you look, that's what they advertise.

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[p. 237] of, loss of feed value. When it's in a conventional silo it's much higher, it says.

BY MR. SHEPARD:



Q. Okay. Where are you looking, just so I'm clear on what part of this you're looking at now?

A. Okay. Well, number five. "Because it's stored in an oxygen-limited environment, haylage is protected from storage losses caused by spoilage, mold and oxidation of nutritional elements. Under good management only about three to four percent of dry matter will be lost during storage in a Harvestore system, and most of that is the result of natural fermentation process that makes palatable feed. By contrast, losses in other types of storages can be considerably higher."

Q. And why was that paragraph important to you when you read it?

A. Well, it convinced me that I was still doing the right thing, that I wasn't getting any loss and I made a good buy. Number 22 on page six.

Q. That entire paragraph?

A. Yes, I would say so.

Q. And why was that paragraph important to you when you read it?

A. It's pertaining to better animal health. [p.238] "Harvestore" system owners report general improvement in animal health when haylage is fed. Soggy forages such as corn silage or hay crop silage at 60 to 75 percent moisture can lead to digestive problems in cattle. Dust and mold in dry hay can also be harmful to animals' health. Harvestore system haylage provides dust-free and-easy-to-digest

rations." Another reason to believe that I bought the best silo.

Q. Okay. Is there anything else in this exhibit?

A. Page 10, and 11. They're both the same. They're all about storage, about farmers having success with their Harvestores and making lots of money.

Q. Why were those stories important to you?

A. It assured me that it's obtainable from owning a Harvestore.

Q. Okay. Is there anything else?

A. No, that would be all.

MR. BIRD: In fairness to the witness, he's been working a lot harder than we have. I want to ask him if he wants to have a break here.

THE WITNESS: That would be fine.

MR. SHEPARD: Okay. That's fine.

(Brief recess.)

BY MR. SHEPARD:

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[p. 242] on their own.

Q. What did this article make you think with respect to what you were doing on your own farm?

A. That my Harvestore system was working just fine.

Q. When you say that, are you talking about the high-moisture corn?

A. High-moisture corn, yes. Then on page 14 they have a conclusion of the study that they did. "The high-moisture corn preserved in a Harvestore resulted in excellent milk production. Milk composition was normal after adjustment of cows to high-moisture corn. Body weight gains of cows reflected high energy in take with low-moisture corn rations. High-moisture corn was very palatable to dairy cows." I found that the cows always liked my corn. So it made me feel that I was doing the right, going the right direction.

Q. Were those conclusions that are stated there consistent with the experience you had had on your farm feeding high-moisture corn?

A. My cows liked my high-moisture corn.

Q. How about the other conclusions that are stated there?

A. Well, it's hard to say the high-moisture corn preserved in a Harvestore" resulted in excellent [p. 243] milk products. It would be easy to say that if corn was the only thing you feed. But when you feed five, six different things, you can't give all the credit just to one just because it's in there. You got to give credit to the others.

Q. Well, when you read this about high-moisture corn resulting in excellent milk production, did you read this and think to yourself, yeah, that's true of my farm, too?

A. That I'm getting that 2.2 percent milk?

Q. Or that you're getting excellent milk production?

A. I guess at the time I felt maybe I was getting excellent milk production. At the time.

Q. Do you know what your milk production was at the time you saw this, or read this?

MR. BIRD: I'm going to object. There's no foundation. He can't recall when he read it, so it's not possible for him to --

BY MR. SHEPARD:

Q. That's all I'm asking. He can tell me if he remembers.

A. No, I would not remember. (Pause.)

Q. Page 24. "Why is a Harvestore called an oxygen-limited crop processing system?" They did research. "Authorities in this research bulletin [p. 244] have covered the specifics of feed making in a Harvestore oxygen-limited structure. Their research shows a very decided advantage of using the oxygen-limited method of crop processing and storage.

"It is important to the final quality of the feed and the performance of the livestock we have seen that air be

limited while the crop is in storage. The Harvestore structure is as sealed a unit as can be practically assembled and operated with present technology. After filling the Harvestore structure it is closed using the top latch. Any oxygen in the air trapped in the structure at filling is quickly used up by the fermentations in the feed being processed.

"In fact, it should be completely utilized three to four hours after filling doors are shut in the fermentation process. Plant and bacteria enzymes take the starches and convert them in part to sugar. Sugar, through bacterial action, are converted to acids and carbon dioxide. As the acidity increases enough, it brings to a halt a bacteria action. The oxygen is used in the process. Soon there is a low pH and an absence of harmful oxygen. In a way, it is similar to a

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A. [p.254] At what time?

Q. Yes.

A. I'd have to say very recently.

Q. Since you started this lawsuit?

A. Yes.

Q. Let's look at Exhibit 14, please.

MR. BIRD: "This is a long one. He's going to take some time going through it. Do you mind going off the record so I can ask you some questions?

(Off-the-record discussion)

BY MR. SHEPARD:

Q. Mr. Klehr, looking at Exhibit 14, do you recall seeing this document before you filed this lawsuit?

A. Yes, I do.

Q. Do you remember when you saw it?

A. Back in probably '83, '84.

Q. Do you remember how you got it?

A. Probably, I'm certain it was sent to me.

Q. Is there something specific you recall reading in this document that was important to you when you read it in 1983 or 1984?

A. They don't have page numbers on here, but I believe it's page three. No. Maybe four. Page four.

Q. [p. 255] What does it say at the top?

A. Oh, boy. A Program to Efficiency: Manage Your Feed.

Q. Okay. I gotcha.

A. The article under the Harvestore structure is oxygen-limited. "Forage or grain is protected from the free access of air by a breather system, helping prevent spoilage and production and mild fermentation that gives feeds an



appealing odor and palatable taste. Breather bags expand and contract to relieve changes of pressure inside the structure as outside temperatures rise and fall. Outside air doesn't have to enter the structure because over fermentation oxidations are minimized. More nutrients are preserved. That means more feed power to help your livestock perform at their best."

Q. Is there anything else here that you recall reading in '83 or '84?

A. No. That would be all.

MR. BIRD: Shall we quit?

MR. SHEPARD: Sure. That's fine. Let me indicate for the record that we still have a number of advertisements that we have not had a chance to review with the witness. In

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[p. 269] one of the things that Mr. Deutsch told you is that you could expect increased milk production when you put the Harvestore on the farm. Is that correct?

A. Yes.

Q. Did he make any statements to you about how much additional milk production you could expect from use of the Harvestore?

A. Yes.

Q. What did he tell you?

A. From three to five pounds increase.

Q. An additional three to five pounds of milk per cow per day?

A. Yes.

Q. And did you understand that to be a one-time increase or something that you would get each year you used the Harvestore?

MR. BIRD: I'm going to object. What do you mean by one-time increase? As opposed to each year?

BY MR. SHEPARD:

Q. Well, I guess what I mean is, did you understand that to mean that your production would go up three to five pounds per cow per day once you started feeding from the Harvestore and then it would stay at that level, or did you understand it to mean

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[p. 273] me, but I recall that the structure was installed or actually constructed on your farm sometime the following February, the end of February 1975. Does that sound right to you?

A. It's very close, yes.

Q. And after you had the silo installed on the farm, how soon after that time in February 1975 did you actually put feed into the silo?

A. That following spring, late May or early June.

Q. And what did you fill it with?

A. Haylage.

Q. So this would have been your first cutting of alfalfa in the spring?

A. Yes.

Q. Do you remember how full you filled the structure during that first cutting?

A. I cannot remember.

Q. Well, based on your experience over the years, can you give me an approximation of how full the structure would be after one cutting of haylage?

A. When you look down from the top, you can never see -- I mean, it's so dark down there you don't know where your line is. I have no idea how much we put in there.

Q. Did you put more than one cutting of haylage in the [p. 274] silo in 1975?

A. Yes.

Q. How many more cuttings after that first cutting did you put in?

A. The second and third cutting were put in. I can't recall if a fourth cutting was made that year or not.

Q. Do you remember when you first started feeding out of the silo?

A. I would imagine a few days after we started filling.

Q. What guidelines if any did you follow when you were filling the silo in 1975?

A. We cut the hay early, chopped it very fine, and filled it as fast as we could, I guess. Or we chopped hay all day and filled silo.

Q. And were those all guidelines that Mr. Deutsch had told you to follow?

A. About cutting hay early -- well, these are the things that, yes, I'd say Mr. Deutsch told me that. The brochures told me that.

Q. Do you remember what moisture content you put the feed up at?

A. Anywhere between 35 and 55 percent moisture.

Q. When you first began feeding the haylage out of the

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Q. [p. 276] Right.

A. I can't recall what it smelled like the first days I took it out.

Q. Did you make any sort of observations about the temperature of the feed when it came out?

MR. BIRD: When?

BY MR. SHEPARD:

Q. Right in the beginning, when you first started feeding out of it in 1975.

A. The first days? It was, it might have been a little bit warm, but this was expected to be. But I guess whatever it was, it definitely come out just a little bit warm, yes.

Q. What do you mean when you say it came out a little bit warm?

A. Well, warm to the touch, I believe. Just anytime -- I knew fermentation would be taking place, and so I felt that it was a little bit on the warm.

Q. Did the appearance of the feed change at all during the summer months of 1973 when you were feeding out of it?

A. Yes.

Q. How did it change?

A. Well, it got somewhat darker. Then it turned into [p. 277] a browner color.

Q. When you say browner, can you be more specific about how it looked?

A. It had that brownish color.

Q. Did you notice any other changes in the feed over the course of the summer in 1975, if you remember?

MR. BIRD: In the color?

BY MR. SHEPARD:

Q. Any sort of -- anything you saw.

A. Well, as the color got to where it was in the browner, then the molasses smell would come and the smell of the haylage was -- like I said, the first days there wasn't no smell of haylage. But as it moved on, yes, the aroma, the smell of the haylage, like molasses, and it stayed that same color.

Q. When you say molasses, was it a fermented smell, a pickled smell, or are you describing something else?

MR. BIRD: Wait a minute now. Feed can be like wine. Everybody has a different description of it. You know, you're giving him different adjectives that may mean different things to him than they mean to you.

MR. SHEPARD: I don't want to --

MR. BIRD: Well, you're arguing with

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[p. 280] then. From let's say September of '75 until the end of the year 1975, for the fall months and the first early months of winter, what did you notice about the feed?



A. It had the dark, the brown color and smelled like molasses. It was warm to the touch.

Q. Did the color of the feed change at all during those months compared to the color you had seen during the summer months?

A. When you say summer months, are you talking about the first days that I opened it, started?

Q. Well we talked originally when you said, I believe you said the first few days when you started feeding out of it the feed was greenish color.

A. Yes.

Q. And then we talked about over the course of the summer and you said it started to look brownish.

A. Yes.

Q. I'm asking you now, during the fall of 1975, from September until December, whether the color changed or looked any different to you compared to the color you had seen during the summer months?

A. No.

Q. Did the smell of the feed change at all?

A. No.

Q. [p. 281] Did you observe any changes in the temperature of the feed?

A. No.

Q. Did you see any mold in the feed?

A. You're talking what period now?

Q. Between September and December of 1975.

A. No.

Q. Did you see any spoilage in the feed from September to December?

A. No.

Q. Let's talk now about the period of time from January of 1975 through May of 1975, during the winter and then into the spring of 1976. Did you notice any change in the appearance of the feed during that period?

A. No.

Q. Did the feed look any different to you from January to May than it did in the fall of 1975?

MR. BIRD: I guess you're changing. You said in the spring and now you're going to May?

BY MR. SHEPARD:

Q. Well, I'm not trying to -- I guess I'm using the terms to mean the same thing. I'm talking about the period from, let's say January 1976 until whenever you began filling it again. I'm just [p. 282] using May because that's when you said you thought you had filled it in 1975.

So my question is, during that period from January of '75 to May of 1976 did the feed change, did the appearance of the feed change at all compared to what you had seen in the fall of 1975?

A. No.

Q. Did you notice any changes in the smell of the feed from January until May?

A. No.

Q. It still had a molasses smell to you?

A. Yes.

Q. And the feed still appeared to have a brownish color?

A. Yes.

Q. Did the temperature of the feed change at all compared to the temperature you had observed during the fall of 1975?

A. No.

Q. And so the feed was still warm to the touch?

A. Yes.

Q. Did you see any mold in the feed from January to May of 1976?

A. No.

Q. [p. 283] Did you see any spoilage in the feed from January to May of 1976?

A. No.

Q. Did you empty the silo completely before you filled it again in the summer of 1976?

A. No.

Q. There was still some feed left in the bottom of it when you filled it again?

A. Yes.

Q. And when did you start filling it again, do you remember?

A. Late May.

Q. Do you have any idea how much was left in the bottom of the structure when you began filling it again?

A. I have no idea.

Q. How did the feed that you saw coming out of the Harvestore during that first year of feeding compare to the haylage you had seen on the farm tours that you went on with Mr. Deutsch before you bought the silo?

A. It was very much like what I had seen.

Q. How did the feed from your Harvestore compare to the haylage you had seen in the stave silos when you went on the farm tours with Mr. Von Bank?

A. [p. 284] Very comparable.

Q. How did the feed that you had during that first year of feeding compare to what you had been led to expect by Mr. Deutsch when he sold you the silo?

A. How did the -- repeat that question.

Q. Sure. How did the feed compare to what you had been led to expect by Mr. Deutsch when you purchased the silo?

MR. BIRD: Are you talking about observations now, again?

MR. SHEPARD: Yeah.

MR. BIRD: You're still on that?

THE WITNESS: It compared good to what I expected.

BY MR. SHEPARD:

Q. From what you could see, the feed appeared to be as good as Mr. Deutsch had told you it would be?

MR. BIRD: Well, I'm going to object to that. Now you're using good.

BY MR. SHEPARD:

Q. Do you understand the question?

MR. BIRD: I object to that on the grounds that it's vague as to what you mean by good.

THE WITNESS: Yeah. I believe it was as [p. 285] good as what Mr. Deutsch had told me it would be.

BY MR. SHEPARD:

Q. Did it look like good feed for the entire first year you fed from it?

A. You're talking from what date to date?

Q. From May of '75 when you filled it until May of '76 when you filled it for the second year.

A. Yes. The feed looked, it looked just like I expected it to be.

Q. Did you talk to Mr. Deutsch at all about the feed during that first year that you were feeding out of it?

A. Yes, I'm certain.

Q. What do you remember talking to him about?

A. I know he came several times and we looked at it, we picked it up, we smelled it. Everything looked fine.

Q. Did you indicate to him that you were satisfied with the feed that you were getting from the silo?

A. Yes.



Q. Were you satisfied with the way the silo was operating?

A. Yes.

Q. Did you and Mr. Deutsch talk about anything else during those times when he came to your farm,

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[p. 287] MR. BIRD: What feed?

MR. SHEPARD: The feed that was coming out.

MR. BIRD: The new feed?

BY MR. SHEPARD:

Q. Well, no. I understand, just so it's clear, that you had some feed left in the silo from the previous year when you filled it again in '76. Correct?

A. Yes. Yes.

Q. And I understand that while you were filling, putting a new cutting on top, you were still feeding off the bottom of the previous year's cutting, correct?

A. Yes.

Q. How did the feed appear to you during that time period in the summer of 1976?

MR. BIRD: You're talking about alfalfa that had gone in the year before? Is that what you're talking about?

BY MR. SHEPARD:

Q. Yes. That's --

A. I'd have to say somewhere maybe during July and August when we start getting into the new feeding that there was a few chunks of little mold would [p. 288] come out.

Q. Okay. Up until July or August were you still feeding the haylage you had put in the previous year?

A. Well, by this time it was getting to be a mixing. I can't tell the difference because it all comes out the same color. I couldn't tell you at what point we were feeding one or the other.

Q. Well, during the months of May and June and into July of 1976 how did the feed appear to you that you were seeing coming out?

A. It appeared like it did all winter long.

Q. Did it have the same smell you had observed during the winter and fall?

A. Yes.

Q. Did it have the same temperature or feel to it that you had observed during the winter and fall?

A. Yes.

Q. Now, in July or August what did you observe? And we're talking about 1976 now. In July or August of '76

what did you observe about the feed during that time period?

A. We noticed a few little chunks of mold would come out.

Q. What did the chunks of mold look like?

A. [p. 289] They're just little white chunks about the size of a spoon or something. Not many of them, but there were some there.

Q. About the size of a spoon?

A. They were just little things. Could barely see them, but yea, there was a few little ones there.

Q. What color were the chunks of mold that you saw?

A. A little lighter color, light, maybe white.

Q. How long a period of time did you see these chunks of mold coming out with the feed?

A. I believe probably for about a month, something like that.

Q. And that would have been in July or August?

A. Yes.

Q. Did you see any spoilage in the feed during July or August?

MR. BIRD: Other than the mold?

MR. SHEPARD: Other than the mold.

MR. BIRD: You're asking about what he understood to be spoilage at that time?

BY MR. SHEPARD:

Q. I'm just asking what he saw, yeah.

A. What's the difference between spoilage and mold?

Q. Maybe there isn't any. Did you observe anything other than the mold that you considered to be

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[p. 292] change at all during the spring, winter and spring of 1977?

MR. BIRD: You're talking about alfalfa now, right?

BY MR. SHEPARD:

Q. I'm assuming you put alfalfa haylage in the structure.

A. Yes.

Q. Just so we don't run into a problem later on, was there ever a time between 1975 and 1991 when you put anything in the 25 by 80 Harvestore other than alfalfa haylage?

A. We put corn silage in.

Q. Did you do that more than once?

A. Yes. There was numerous times we put corn silage in the fall on top of the haylage.

Q. Okay. When was the first year you put corn silage in on top of the haylage?

A. Oh, that, I could not give you. I have no idea what year it was.

Q. Well, we were talking just a moment ago about the feed during the latter half of 1976 and into 1977. During that time period had you put any corn silage into the silo that you remember?

A. No.

Q. [p. 293] Did the appearance of the haylage change at all from what you've described to me already during the period of time from January of 1977 until May of 1977?

A. No.

Q. And how did that feed, again, compare to what Mr. Deutsch, what you had been led to expect by Mr. Deutsch and what you had read about the Harvestore silo before you bought it?

A. It appeared to be what I expected.

Q. Were you satisfied with the feed you were getting?

A. I was satisfied with the quality, yes.

Q. Do you remember talking to Mr. Deutsch at all during that second year of feeding about the Harvestore silo?

A. Yes.

Q. What do you remember talking to him about?

A. Well, we had talked about the little white molds, or chunks that came out. And he says that that is the top layer of the silo, that you will see a little bit of that.

Q. Are you talking about this time period in July and August of 1976?

A. Yes. Yes.

Q. And this was after you had seen the chunks of mold [p. 294] that you talked about?

A. Yes.

Q. Did you bring that up with Mr. Deutsch?

A. Yes.

Q. Why did you talk to him about it?

A. Well, I was concerned about the little molds.

Q. Why were you concerned about them?

A. Well, I hadn't seen it on any of the brochures or any of the farm tours, nobody showed me little molds, so I was concerned why I had some in there.



Q. When you saw those chunks of mold how did that compare to what you expected to get from the Harvestore silo when you bought it?

A. Well, with my experience on the farm, I expected that with Mr. Deutsch telling me that that was from the top layer of the silo, I expected, I understood and accepted the reason.

Q. But before you talked to Mr. Deutsch, when you saw the mold, is that something you had expected to see based on what you had been told and what you had read about the Harvestore?

A. No, I didn't expect that.

Q. And tell me as best you can, and I know this is a long time ago, but tell me as closely as you can what Mr. Deutsch told you when you talked to him [p. 295] about the mold.

A. Well, he was not concerned, because that's a very -- I had the understanding that that was a common thing; you're going to see this layer sometimes between fillings of just a very light, very light mold.

Q. Did he explain to you or tell you at all why it was common to see a layer of mold between the fillings?

A. Well, it's when you put the last of it in, the way he explained it, you close the doors and the hatch is on top. And there is a little oxygen in there and it has to turn into harmless gas first, I guess, and so there is a little time period there where there is a little damage.

Q. Did he explain to you how the oxygen got in there through the top hatch that you just talked about?

A. Well, yes. When you're filling that you definitely, when you close the doors the top of the silo is still full of air until you close the door. I understood that, yes.

Q. Do you remember anything else he told you about the mold that you talked to him about at that time?

A. No, I cannot recall anything else.

Q. Did you show him the feed yourself? Did he come [p. 296] out and actually look at it?

A. At what point?

Q. That July or August time period of 1976.

A. I believe I did not show him the chunks. I don't believe he was out on the farm just on those days, no, or during that period.

Q. Did you talk to anybody else about the feed when you saw those chunks of mold in July or August of 1976?

A. No. I did not talk to anyone else then.

Q. Did Mr. Deutsch tell you or suggest to you that you do anything differently when you were storing your feed when you told him about those chunks of mold?

A. No.

Q. I'm not quite sure where we left off, but from say September of 1976 until December of 1976 -- maybe you already told me this.

MR. SCHMITT: I think you're on the winter and spring of '77.

BY MR. SHEPARD:

Q. Just so I'm clear in my own mind, during that period from September of '76 to December of 1976 did the appearance of the feed change at all compared to what you had seen before you saw the mold?

A. [p. 297] No.

Q. And from the period of January 1977 until May of 1977 what did you observe about the feed?

A. I believe maybe as it got real close to spring we probably did see just a little more mold, because that spring we did run it empty. We went empty before filling.

Q. When did you see the mold in the spring of 1977, as best as you can recall?

A. It was just the last week or so before it went empty.

Q. And what did the feed look like during that time period?

A. Up to that time period it looked like it normally did. Up to it. And then during that time period it was a little bit darker with some more white chunks.

Q. When you say it was a little bit darker, how would you describe the color of it?

A. Well, just a little darker brown.

Q. And what did the mold look like?

A. Little white chunks.

Q. How big were the chunks?

A. Oh, they were very small, very small.

Q. Do you remember when you emptied the silo that [p. 298] year?

A. It had to be about two weeks before the silage was coming in, I'm very certain.

Q. Would that be sometime roughly in May then?

A. Yeah. Early part of May maybe. Early May.

MR. BIRD: Where are we at? We're in May of '77 now?

BY MR. SHEPARD:

Q. Right. When you saw the mold in the feed in that last week of feedout in May of 1977 did you talk to anybody about the feed then?

A. I believe my serviceman or my salesman was out then, yes.

Q. Was that Mr. Deutsch?

A. Mr. Deutsch.

Q. What did you say to Mr. Deutsch when he was out there?

A. I told him, I showed him the feed, what was coming out. And he explained that that was the end of the silo coming out and that's what happened, because about a week later it was empty.

Q. Did he tell you anything else about the feed?

A. Well, no. The molasses smell wasn't there just at the end no more. That's all we talked about. No, he didn't say anything else.

Q. [p. 299] How did the feed smell during that period at the very end?

A. It had sort of a musty smell.

Q. How did that, the feed at that time that you showed to Mr. Deutsch, compare to what you had expected from the Harvestore when you bought it?

MR. BIRD: You mean the moldy, musty feed?

BY MR. SHEPARD:

Q. Right.

A. I guess I did not expect that.

Q. Did Mr. Deutsch tell you anything else about the feed during that time that you remember?

A. No.

Q. Did he make any suggestions to you about the way you were using or managing the silo?

A. No.

Q. Did you fill the silo again in May of '77 with alfalfa haylage?

A. Yes.

Q. Do you remember how many cuttings of haylage you got in 1977?

A. I cannot remember how many cuttings, but we put a lot of haylage in that year.

Q. How is it that you remember that 1977 was a year

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Q. [p. 301] Did it look just the way it had in the previous two years?

A. Yes.

Q. Had the same brownish color?

A. Yes.

Q. And did it have the same temperature feeling?



A. Yes.

Q. Did it have the same smell?

A. Yes.

Q. During the fall of 1977, from say September to December of 1977, did the appearance of the feed change at all?

A. In what time period?

Q. From say September of 1977 to December of 1977.

A. No. It all stayed the same.

Q. Did you top the haylage off with corn silage in that year?

A. I don't believe so.

Q. From January of '78 to May of 1978 did you notice any changes at all in the appearance of the feed?

A. There was a few times in between there where we'd get just a few little chunks of mold, and then it was gone again. And then towards the spring we went through the same thing we had done the year before for a week or so. But otherwise, through [p. 302] the winter it stayed the same until just the last, the very last, we had some little mold.

Q. Did you have any -- I thought you said you saw some little chunks of mold somewhere along that time period before you got to the last week. Is that right?

A. Yes.

Q. When was that, do you remember?

A. Oh, I have no idea. It was -- I could not tell you what periods or what time it was. It was during the winter when just a few little chunks come out.

Q. How long did you see those little chunks of mold in the winter?

A. Just a few days and then it was gone.

Q. And after those few days the feed returned to its normal appearance?

A. Yes.

Q. And what happened in the spring when you got to the end of the feed?

A. The last maybe two weeks it got very musty and we seen a significant amount of molds.

Q. When you say significant amount of mold, was it more mold than you had seen the first two years?

A. No. The first, not the first two years, because the first year we didn't see any mold. Repeat what [p. 303] you just asked me.

Q. Okay. I thought during that --

A. First year we didn't go empty, so we didn't see any molds. Second year and the third year are about the same.

MR. BIRD: You're going from June to June on your years, right?

BY MR. SHEPARD:

Q. Yeah. I can rephrase the question. Was it more mold than you had seen at the end of the first two cycles of feeding?

A. At the end of the second -- okay. At the end of the first -- about the same.

Q. Okay. But how long did you see the mold in the feed during that time?

A. I thought we were talking about the end of the silo now.

Q. Right.

A. Oh. I'd say just about two weeks, just before it went empty.

Q. And the feed had a musty smell during that time?

A. Yes. Yes.

Q. Did the, color of the feed change at all during that time period?

A. Well, it was much darker and, much darker brown, [p. 304] yeah.

Q. Did you notice anything about the temperature of the feed during that last two weeks?

A. No.

Q. What did you do with the feed at the very end, that last two weeks?

A. Well, I'm positive that when it got to the point where it was getting pretty bad we hauled it -- we had maybe a load or two, manure spreader, one or two loads that we hauled out in the field.

Q. When you said -- how many loads of feed did you haul out to the field that year?

A. Well, two manure spreaders full, I believe.

Q. In 1977, the previous year, did you feed all the feed out, or did you have to throw some out?

A. We threw some out that time, too. We went in and cleaned out the silo and there was some moldy chunks in there that we threw out.

Q. How much do you remember throwing out the previous year?

A. I cannot remember the amount.

Q. Was it more or less than two manure spreaders, if you remember?

A. Not more. Somewhere in there.

Q. And in 1976, in July or August that first year, did

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[p. 310] or the following year I cannot pinpoint it out.

Q. Well, whether it was in the spring of 1979 or the spring of 1980, can you tell me what you observed the year when you had apparently more spoilage than you had had the preceding years?

A. Well, the one year it got quite spoiled at the end, but much sooner than it normally did. It was much darker and much more mold.

Q. And this was in the spring of either 1979 or '80?

A. Well, it's -- you could put a bunch of years together. I can't pinpoint if it was this year or that year or maybe the next year, but I know there was years we had more damage in the spring than we had other years.

Q. But it was somewhere in that '79, '80 time frame?

A. Or maybe '81.

Q. Or '81?

Q. In an area, yes.

Q. When you said it spoiled sooner, when do you recall observing spoilage that year?

MR. BIRD: I think he said there were some years. Now you're asking him to specify a particular year.

MR. SCHMITT: He did indicate there was one year that he had -- that was his phrase, "one [p. 311] year."

MR. BIRD: I think if you read his answer back he said there were some years where he had more spoilage.

MR. SCHMITT: Later on, but when we got into this reference he referenced one year.

MR. BIRD: I don't know if that's true or not, but you can go ahead and answer.

THE WITNESS: Are you talking of a certain year or in that time frame?

BY MR. SHEPARD:

Q. Well, I thought I understood you to say that somewhere whether it was 1979 or 1980 or 1981, somewhere around in there you remember a year where you had more spoilage than you had had in the previous years.

A. Yes.

Q. Was it just one year or were there more than one years in that time period where you had --

A. I'd say one year for certain.

Q. And whatever that one year was, whether it was 1979 or 1980 or 1981, tell me when you first saw the spoiled feed that year.

A. It was toward spring. I'd say very much around in April.

Q. [p. 312] What did you see in the feed in April of that year?



A. It was dark, a very dark, and a lot of mold.

Q. When you say very dark, can you describe the color of it?

A. No. But it was darker than what I was normally used to feeding.

Q. Was it dark brown or was it black?

A. Dark brown.

Q. And what did the mold look like that you saw during that time period?

A. It was more consistent. We had more of it coming out at a time.

Q. Were there bigger chunks?

A. Yes, I would say there was probably some bigger chunks in there.

Q. Do you recall how big the chunks of mold were?

A. No, I could not recall how big they were.

Q. —And was this also in about April of that year?

A. Yeah.

Q. What color was the mold that you saw?

A. Light and white. Grays.

Q. When you say there was more of it or it was more consistent, did you see it every time you fed from the silo during that time period?

A. [p. 313] Well, that time period is about the time that we shut it down and we hauled the rest of it out in the field that one year. We did not feed it to the cows no more that spring.

Q. What, as best you recall, what time of year was it that you shut it down?

A. Well, in April.

Q. What did you do with the feed that was still in the silo?

A. It was hauled out to the field.

Q. How much feed did you haul out to the field?

A. We hauled for two days. But how many loads, I'd say maybe a dozen manure spreader loads.

Q. Were you involved in actually hauling the feed out to the fields?

A. Oh, yes.

Q. Was there someone else that was working with you?

A. Yes. There was a hired man there.

Q. Do you remember who it was?

A. Donald Pauly.

Q. Did anyone else help you haul it out to the field?

A. I believe not.

Q. When you were putting the spoiled feed into the manure spreader how did you actually get it from the silo out to the field?

[p. 314] MR. BIRD: You mean, with a tractor?

BY MR. SHEPARD:

Q. Physically. Yeah. I'm just wondering, would you run the feed out the unloader on the conveyors and just right into the manure spreader or how did you actually do that?

A. Yes. That's how we did it.

Q. You would just back the manure spreader up to the

A. Well, we had a conveyor going all the way across the barn that would take the feed to the other side, so we just put a board there and backed the spreader down through the center of the barn and filled it up that way. It would fall off. Sort of plow itself off.

Q. And how much does the manure spreader hold? Do you have any idea what the capacity is?

MR. BIRD: Don't guess.

THE WITNESS: I could not say.

BY MR. SHEPARD:

Q. But your recollection is it was twelve or more spreader loads?

A. Yes.

Q. What did you feed to your dairy cows during that time period after you shut down the Harvestore?

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Q. [319] What did you do after you saw the spoilage in the Harvestore in that particular year?

A. MVBA was called out and they checked the unit out and replaced, I believe, a breather bag, one for certain, and checked out the pressure on the silo, see if it was airtight.

Q. Do you remember who you talked to at MVBA about that problem?

A. I could not say for certain, no.

Q. Do you remember if you talked to Mr. Deutsch about the feed?

A. Well, I'm sure Mr. Deutsch, I did talk to him somewhere in that period, yes.

Q. What did you say to Mr. Deutsch when you spoke to him?

A. I told him about the spoiled feed. We looked at it and he said that they would come out, check the silo, check the breather bags and that they could fix whatever it was that caused it.

Q. Did he actually come out and look at the feed?

A. Yes.

Q. What did he say when he saw the feed?

A. Well, he figured somehow some air must have gotten into the silo.

Q. Did he tell you or say anything to you about how [p. 320] air had gotten in?

A. His question, or conversation was that he thought it was a breather bag, but it had not been checked out yet at that point.

Q. Do you remember who from MVBA actually did the testing or the investigation?

A. No, I could not tell you who it was.

Q. At that point, in any event, they replaced at least one breather bag.

A. My vague memory would say at least one was replaced.

Q. What did they discover in the old breather bag?

A. I have no idea what they found. It was, I believe it had a hole in it or something was wrong. I don't know.

Q. Did you ask the person or people who did the repairs what they had found in the old bag?

A. No.

Q. Did you look at the old bag?

A. I don't believe so.

Q. Did they say anything to you after they replaced the bag, that you remember?

A. They pressure tested the silo and everything was repaired.

Q. Were you there when they did the pressure test?

A. [p. 321] Yes.

Q. What were the results of the pressure test?

A. Everything was fine. It was sealed again.

Q. Did you talk to the people from MVBA while they were doing the pressure testing?

A. I was in and around the barn. I imagine I talked to them, but I have no idea what was the conversation. They were just doing their work, and that's what was going on.



Q. Did anyone from MVBA, whether it was Mr. Deutsch or anyone else, make any comments to you about the way you were using or managing the silo?

A. No.

MR. BIRD: At that time?

BY MR. SHEPARD:

Q. At that time?

A. No.

Q. At any point in time up to this particular occasion that you're talking about, had anyone from MVBA made any comments to you about your management or use of the silo?

A. In what time period are you talking?

Q. Up until the time that you had this breather bag replaced.

A. And you're going back from new?

Q. [p. 322] Yeah.

A. Well, Mr. Deutsch did come down into the feedroom a few times, and Ben Johannes I remember coming down there, and they looked at the feed. They'd pick it up, and there was some comments about maybe a little bit on the dry side or a little bit on the wet side, chopped too fine or chopped too long. Those conversations were brought up.

Q. Well let's go back and find out when you had those conversations. First of all, how many times do you recall having that kind of a discussion with Mr. Deutsch?

MR. BIRD: You mean over the whole period?

MR. SHEPARD: From 1975 up until the time the breather bag was replaced.

MR. BIRD: Well, I guess I'm going to object to that because I don't - - he's saying he can't recall precisely when the breather bag was replaced.

MR. SHEPARD: Well, Charlie, he's the one that just gave me this testimony. I'm just asking him how many times it happened.

MR. BIRD: Well, I'm making an objection on the grounds that I think it's an impossible [p. 323] thing for him to answer using those constraints. If you think you can answer it, go ahead.

THE WITNESS: How many times? I'd say maybe two, three times.

BY MR. SHEPARD:

Q. Two or three a times before you had this breather bag replaced?

MR. BIRD: Objection. He just answered that.

THE WITNESS: Yeah.

BY MR. SHEPARD:

Q. And to the best of your recollection, when did you have that first conversation with Mr. Deutsch?

A. I could not tell you when, what year it was or what date.

Q. But he told you - - tell me as best you recall what he said to you during that first meeting with him where he commented on your management.

A. When he came to visit the farm we usually walked down into the feedroom. We'd run some haylage out. He'd pick it up and look at it. And a lot of times it looked good and sometimes -- I shouldn't say good, but sometimes it looked fine and then he'd find some, oh, maybe it should be chopped a little finer or chopped a little wetter or chopped [p. 324] a little drier.

Q. Okay. I'm really sorry to do this, but we're talking about -- I realize this is a long time ago, and we went through the first couple of years that you used the Harvestore. And I thought I understood you to say that after each of those first two years that you used the silo when you saw the little bit of mold at the end of the feedstack that you talked to Mr. Deutsch about those observations of mold at that time.

A. Yes.

Q. And I thought you told me that he, Mr. Deutsch, told you that it was just the end of the feedstack and that it was because there was some air that was trapped in the top when you filled it. Is that what you remember?

A. Yes. Yes.

Q. And I thought you told me that in those first two years he didn't make any comments to you about your management or use of the silo. Is that accurate?

A. Well, any comments or use of the silo?

Q. About the way you were using the silo.

A. I'm confused. I don't understand what you mean.

Q. Okay. After the first two years, you'd fed out of the silo two full years.

A. [p. 325] Yeah.

Q. And at the end of each year you had seen a little bit of mold and you talked to Mr. Deutsch about the mold and he explained to you that the mold was caused by air that had been in the silo from when you filled it.

A. Uh-huh.

Q. Correct?

A. Yes.

Q. I thought you had told me earlier that he didn't make any comments to you on either of those occasions about the way you were using the silo. He didn't comment to you that you weren't using it properly.

MR. BIRD: Are you talking about at that time or at any other time?

MR. SHEPARD: I'm talking about the first two years.

MR. BIRD: Well, I'm going to object, because I think you're going from a specific incident to a whole time, from the way you're explaining the question, and I think it's unfair. But go ahead and answer.

THE WITNESS: Up to them first two years I had the understanding that I was doing everything [p. 326] very much correct.

BY MR. SHEPARD:

Q. All right. Then the third year, beginning when you filled the silo in May of 1977, you told me that you saw mold again at the end of the feedout the following spring.

A. Uh-huh.

Q. Yes?

A. Yes.

Q. In the spring of 1978.

A. Yes.

Q. And that was the year you had to haul approximately two manure spreaders to the field.

A. Yes.

Q. Did you talk to Mr. Deutsch about the moldy feed you saw that year?

A. Yes.

Q. What, if anything, did he tell you about the moldy feed that year?

A. That this was the end of the silo and that this was the top layer.

Q. Did Mr. Deutsch make any comments to you at that time about the way you were using or operating the Harvestore silo?

A. No.

[p. 327] MR. BIRD: All right. Now, wait. Again I'm confused, Blake. Are you talking about at this specific time at the end of the year and you're not talking about any visits this guy might have made throughout the year? That's where I'm confused.

MR. SHEPARD: I'm talking about when he saw the mold in the spring of 1978.

MR. BIRD: And that's what your other questions went to.

MR. SHEPARD: Correct.

MR. BIRD: All right.

BY MR. SHEPARD:

Q. He didn't make any comments to you.

A. No.



Q. Now, during the other months during those first three years when you were getting what you thought was the normal feed, did Mr. Deutsch at any time during those first three years come out to your farm and make any comments to you about the way you were using or operating the Harvestore silo?

A. Well, he never said I was doing anything bad. I mean, as far as comments go it was -- I'd have to say no.

Q. Okay. Now, in this time frame from 1979, 1980, 1981, you've told me about one year when you had a [p. 328] much bigger problem with spoilage.

A. Yes.

Q. In April.

A. Yes.

Q. And you had to haul the spoiled feed out in the manure spreader and take it out to the fields, and you did that for two days.

A. Yes.

Q. And when you talked to Mr. Deutsch about that problem did he make any comments to you at that time about the way you had been using or operating the Harvestore silo?

A. No.

Q. At any time between the spring of 1978 and this particular year when you had the bad feed in April, had Mr.

Deutsch made any comments to you about the way you had been using or operating the Harvestore silo?

A. Are we talking about the April that we hauled all this out?

Q. Correct.

A. I can't remember if he did. He stopped by many times and we had little conversations, but I can't remember if that was the year that he said anything or not.

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Q. [p. 330] Okay. I'm trying to find out, when I say did he make any comments to you about the way you were using or operating the silo, what I want to know is did he come out and suggest to you that you either were doing something you shouldn't be doing or that you ought to be doing something different?

MR. BIRD: Are you saying -- well, I think you guys are two ships passing in the night here. He wants to know what these too wet, too dry, too fine times were, and he's calling it operation and management of the silo.

Now, I think he's not including that in the end of the question. Now, if I'm wrong on this, you know -- but let's get beyond this point here. Do you see what I'm saying? He wants to know what those conversations were where it was too wet, too dry, too early or too late, whatever.

THE WITNESS: Yeah. And I can't pinpoint the year or the date or the month down that he said that.

BY MR. SHEPARD:

Q. Was it at any point during the first three years?

A. I don't believe so.

Q. Okay. So it was sometime after June of 1978, or thereabouts.

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[p. 332] feed being too long or too short or too wet or too dry, what exactly did he tell you?

A. He didn't tell me anything. He looked at it and he thought maybe this was - - he'd pick out a couple of pieces and he thought this was maybe a little bit too long. All he was doing was trying to tell me that maybe you should check your chopper and make sure everything is good and sharp. In other words, he was keeping me on my toes that I kept on doing - - that's what my feelings was at that time.

Q. You understood that what he was telling you to do was just keep doing what you were doing and keep paying attention to your management?

A. Yes. I believe that's what - - yes. That was my understanding.

Q. After he made that comment to you, did you follow those suggestions that he gave you?

A. Well, I was more observant of it as far as keeping the knives sharp and chopping it at a closer moisture than

what we wanted it to be. Make certain it didn't get too dry or anything like that, yes.

Q. And was there another conversation with Mr. Deutsch where he commented on the way you were putting the feed up or managing the silo, other than this one

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[p. 334] THE WITNESS: No, I have no idea at all.

BY MR. SHEPARD:

Q. Well let me try this. Was it in or around 1980?

MR. BIRD: Objection. Asked and answered.

THE WITNESS: I have no idea.

BY MR. SHEPARD:

Q. Was it around 1985?

MR. BIRD: Objection. Asked and answered.

THE WITNESS: I can't pinpoint any year. All I know is that over the years he came down there and occasionally, once in a while, he'd say, well, it should be a little wetter or just a little bit finer.

BY MR. SHEPARD:

Q. Do you recall, whenever these conversations took place, do you recall specifically an occasion where he told you it should be a little bit wetter?

A. Yes. There was some conversations that I should put it up a little bit wetter or try to keep it a little wetter.

Q. Now, up until that time had you always been careful to try to follow the moisture recommendations - -

A. Yes.

Q. [p. 335] - - as closely as you could?

A. Yes.

Q. And after he made the comment to you that the feed should be put up perhaps a little bit wetter, did you pay attention to make sure that you followed that recommendation from then on?

A. Yes. I tried. Yes.

Q. And when he made these comments to you, were you having problems with your feed at that time?

A. No.

Q. And did you understand that these conversations were simply comments made by Mr. Deutsch to remind you to follow the same management guidelines you had been trying to follow all along?

A. Yes.

Q. And you did that from the time he made those comments until you stopped using the silo.

A. Yes.

Q. After this incident where the breather bag was replaced, when did you start filling the silo again?

A. At harvest time.

Q. The end, of May?

A. Usually whenever the first prebud stage we start cutting hay. It varied every week - - or every year [p. 336] it would vary by maybe a week.

Q. What did you notice about the quality of the feed the following year after you had the breather bag replaced?

A. Everything returned to very normal.

Q. And over the course of that year did you make any other observations about the feed that were different than the feed you had during those first few years you used it?

A. No. I'd say it was very consistent to what I was used to seeing.

Q. At the end of that year following the time when you had the breather bag replaced, how was the feed at the end of the year?

A. We had just a small amount of spoilage that we cleaned out of the silo again.

Q. Do you recall how much spoilage you had that year?

A. It's hard to say that year, but - - I'm not going to guess, but maybe one spreader load.



Q. That was the spreader load you had to haul out and dump in the field?

A. Yes.

Q. After you had that spoilage that year did you talk to Mr. Deutsch about the feed that year?

A. I would imagine, yes. I can't recall what was said

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A. [p. 338] I'm sure I have.

Q. And for the record, this appears to be a service invoice from MVBA addressed to you, is that correct?

A. Yes.

Q. And the invoice shows apparently a replacement of a breather bag in the 25 by 80 foot Harvestore, is that right? I'm looking over here on the left where it says, "Changed bag in 25 by 80"?

A. Yes.

Q. And the date here is June 28, 1982.

A. Okay.

Q. Now, does this document relate to the incident we were talking about a few moments ago, when you had the breather bag replaced in the 25 by 80?

A. I would say yes, it is.

Q. Okay. And so it's clear, the event that we were talking about where you had the breather bag replaced occurred in 1982. Does that appear to be the case?

A. Yes.

Q. And that incident where you had moldy feed in April where you had to haul the twelve spreader loads of feed into the field occurred in April of 1982. Would that be right?

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[p. 348] let's say up till 1990. Do you recall any specific observations about the feed from 1984 to 1990?

A. Generally speaking, I'd have to say that I did not observe any change in the feed.

Q. And by that do you mean that you didn't see any mold or spoilage during those years?

A. Well, there was, occasionally in the spring we would see just a little bit when we emptied out. And then maybe during the winter or during the year we'd see a little bit, but it was, it was, I thought, insignificant.

Q. So from 1984 to 1990 the feed - - I'm going to try to just state what I understand and if I misstate it, you tell me. I'm just trying to summarize, so we don't have to go through this year after year after year.

1984 to 1990, would I be correct to say that the feed generally appeared to be brownish and that you did not observe mold until the spring, the very end, last week or two, when you would have some mold and spoilage?

MR. BIRD: Objection. That's not what he testified. He said he'd see a little bit throughout the year.

[p. 349] BY MR. SHEPARD:

Q. If I've misstated that, you tell me how I'm wrong.

A. Throughout the year we would occasionally see, it would only be for a short time, we would see just little chunks of mold, very little, for a short time. Then it was good again for a long time and then in the spring when the silo emptied out, we'd have maybe a load. We always swept our silo out every spring, cleaned it out, and maybe there was two loads some years. I don't know.

MR. SCHMITT: Can I have that read back, please?

(Answer read.)

BY MR. SHEPARD:

Q. And what you've just described is what you recall observing of the feed from this time period of 1984 to 1990. Am I correct about that?

A. Yes.

Q. And that would be consistent with every year you used the silo up until 1990, with the exception of the one year where you had the problem in April where you had a whole bunch of mold that you had to cart out into the field.

A. Yes.

MR. SCHMITT: The drought year.

BY MR. SHEPARD:

...

Q. [p. 361] Towards the end of April?

A. Yes.

Q. What did the pieces or chunks of mold look like?

A. They looked like they - - very small, just a few little white chunks. No more abnormal than we've seen other years.

Q. And how big were the chunks of mold that you saw?

MR. BIRD: When?

MR. SHEPARD: In April.

MR. BIRD: Well, where is he looking. That's the point I'm trying to make.

BY MR. SHEPARD:

Q. Tell us where you saw these chunks of mold.

A. In the conveyor, after it was coming out of the unloader.

Q. And how big were the chunks of mold that you saw on the conveyor?

A. Well, they could range from a quarter to maybe a half a dollar.

Q. And how did that, the appearance of the feed then compare to what you had seen in the Harvestore the previous Aprils that you had been feeding out of the Harvestore?

A. Very comparable.

Q. So in those previous years you had seen chunks of [p. 362] mold varying in size from the size of a quarter to the size of a half dollar?

A. Are you talking about previous years now?

Q. Correct.

A. I thought we were done with previous years.

Q. Well, I thought so too, but you're telling me that in April of 1991 you saw chunks of mold that were the size of, anywhere from the size of a quarter to the size of a half dollar.

A. There was a few of them in there that big, yes.

Q. And that was no different than what you had seen in the previous, all the previous years that you'd been feeding from the Harvestore.

MR. BIRD: Other than that one year, he's testified.

MR. SHEPARD: Other than the year when he had 12 loads of feed that he had to throw out.

THE WITNESS: Yes. It looked very much familiar to what it had always looked. And the amount of mold coming out looked very much the same.

BY MR. SHEPARD:

Q. And this was the same that you had observed roughly in 1976.

A. '76, it was not emptied out.

Q. [p. 363] Well, it was the same as the feed you observed when you got to the end of the feedstack in the summer of 1976.

A. Yes.

Q. And it was the same as the feed you saw at the end of the year 1977.

MR. BIRD: I'm going to object. It's repetitious. I'm objecting. He's already said it is. I mean, how many times you got to ask him?

BY MR. SHEPARD:

Q. Was it the same as it had been in all those years?

MR. BIRD: I'm objecting. It's repetitious you can answer. This is the last time.

THE WITNESS: Yes, it was the same as what it had looked all those years.



BY MR. SHEPARD:

Q. And that was the case right up until the time that you stopped feeding on May 1st of 1991?

A. Yes.

Q. Did you see anything else in the feed in April of 1991 that you had not seen in previous years.

A. After it came out of the unloader?

Q. Yes.

A. And the question was what?

Q. Did you see anything else in the feed in April of [p. 364] 1991 that you had not seen in all the previous years you'd been using the Harvestore?

A. No.

MR. BIRD: Coming out of the unloader.

BY MR. SHEPARD:

Q. Coming out of the unloader.

A. No.

Q. Did you see anything about the feed other than out of the unloader that you had not seen in previous years?

A. Repeat that question again.

Q. Did you see something in the feed somewhere else in 1991 that you hadn't seen before?

A. In the feed.

Q. In the feed.

A. But not out of the unloader. Other than the unloader.

Q. Yes.

A. Yes.

Q. What was that?

A. I seen mold.

Q. Where did you see that?

A. Inside that silo.

Q. You want to take a break?

A. Yes, please.

Q. [p. 365] Let's go off the record.

(Off-the-record discussion.)

BY MR. SHEPARD:

Q. Mr. Klehr, I apologize. And I know this is all upsetting to you and I apologize. And if at any time you

want to take a break, be sure to let me know and we'll stop. Okay?

A. That's fine. Okay.

Q. You just mentioned a moment ago that at some point in April of '91 you looked somewhere, either inside the silo or inside the unloader, and saw some mold, is that correct?

A. That's correct.

Q. Okay. Tell me where you looked, where you saw that mold.

A. Well, that morning Bill Olson was scheduled to come out. He was going to be out to the farm about 11 o'clock. And I told him I'd have the access door open so that we could take pictures of the silage unloader mixing feed.

I had an ice chisel there on the farm that was probably about four feet long. And I took the access door off and I started chopping some silage away so I could see inside that silo. And I chopped for probably an hour and a half. I made a [p. 366] hole that -- the arm was at the door at the time and so I left it fall down and then it would come out.

And so I kept on getting it away from there. And it took me about hour and a half to two hours, and finally I got to where I could see inside that silo.

Q. So you had the access door open and you were chipping through the feed with some sort of a chisel or something?

A. Yes.

Q. And how far into the silo did you get chipping away with the chisel?

A. Well, I probably got three and a half feet, somewhere in there. Three and a half, maybe four feet in.

Q. And what did you see when you got in there?

A. Well, I had a flashlight at first. And it wasn't, it did not give me much light, so I went up to the house and got a spotlight off the back of the house. And I grabbed my little trouble light and plugged it in and screwed the spotlight in there.

And I put that spotlight in there and it was the ugliest thing you wanted to see.

Q. I'm sorry?

A. [p. 367] It was the ugliest thing you ever want to see.

Q. Tell me as best you can what you saw when you looked in there.

A. There was mold hanging all over the silage.

Q. When you dug in through the access door, did you get, did you dig all the way in till you got to the dome or the cavity inside there?

A. Yes. Yes.

Q. So you had worked your way through the feed on the outside of the structure and had dug into the dome area.

A. Yes.

Q. And what you saw was mold inside the dome?

A. Yes.

Q. And can you explain to me what the mold looked like?

A. It had every color you could think of. It was gray, different shades of gray. There was a spot up there about the size of a good beach ball that was just solid gold. I mean, it was gold.

Q. Solid gold?

A. Gold color, yes.

Q. And do you remember anything else about what you saw that day?

A. No. No. That was, that day I seen all the molds, [p. 368] and that was about all that I seen.

Q. Did Bill Olson come out that day?

A. Yes, he did come out.

Q. And did you show him --

A. Yes, I did show him what I seen.

Q. What did Mr. Olsen tell you?

A. He advised me to shut the thing down and not to feed any more silage out of it.

Q. And was that the last day that you fed from the silo?

A. No. We fed until May 1st, which was two weeks more.

Q. So this date as sometime around the 15th of April?

A. It was the 15th of April.

Q. What was the reason you continued to feed from April 15th to May 1st out of the silo?

A. We had no baled hay left no more at this point and I didn't know where to go to get hay. I had to have some time to locate the hay.

Q. Did you find some baled hay at some point?

A. Well, we started going to the sales barn and buying it up at the sales barn.

Q. When you say the sales barn, is that the name of the location?



A. Well, it's the commission, yeah. Belle Plaine

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Q. [p. 377] Yes.

A. I didn't see Mr. Deutsch for many years. And I was grinding pig feed one day; this was probably in, very possibly the fall of '90. I'm certain it was the fall of '90. And I was grinding pig feed and he came up to visit me then. I mean, he stopped at the farm and we talked by the feed grinder. Then we walked back down towards the barn and looked at the feed.

MR. SHERAN: Fall of '90?

THE WITNESS: Yes.

BY MR. SHEPARD:

Q. And you hadn't seen Mr. Deutsch for several years before that?

A. Mr. Deutsch hadn't been out there for a long time. I didn't know he was still with them.

Q. Did he just show up at the farm?

A. Yes.

Q. What did you talk about with him in the fall of 1990?

A. Well, we talked about the protein cost. I know that was brought up. I had asked Mr. Deutsch that -- he asked

me how the cows were and everything and how production was doing. And then I asked him about, you know, I says, "When we [p. 378] bought this thing you told me that we weren't going to feed much protein." And he says -- I says, "Now," I says, "we are feeding a lot of protein."

And he says, "Yeah. But now your production is so much higher compared to what it was many years ago that you require more protein. All farmers are, because of the genetics and everything, they're getting more milk and so they are challenging with more protein."

Q. Let me back up a minute. You said Mr. Deutsch asked you how your cows were doing and how your production was?

A. Yeah.

Q. What did you tell him?

A. Well, I told him that I wasn't satisfied with the production that I was getting at the time. And that was all.

Q. What did he say to you when you told him you weren't satisfied with your production?

A. He didn't say anything. I would say he didn't say nothing.

Q. What was it about your production at that time that you weren't satisfied with?

A. Well, I thought it should have been higher than what it was.

Q. [p. 379] Do you recall what it was at that time?

A. No, I don't.

Q. Had you complained or expressed your dissatisfaction with your production to anyone other than Mr. Deutsch before that time?

MR. BIRD: I'll object on the grounds that it's overbroad.

THE WITNESS: No. I'd say no.

BY MR. SHEPARD:

Q. Was that discussion in the fall of 1990 the first time you had complained to anyone about your milk production?

A. Well, I really wasn't complaining to Mr. Deutsch. I just told him that I thought my cows should be producing more milk. Yeah, I think that was the first time I mentioned that my production should be higher.

Q. At that time do you remember how much protein you were feeding to your dairy animals?

A. I could not say right offhand.

Q. If we were to go back and look at your records and see how much you were feeding then, do you recall whether you were feeding more protein in the fall of 1990 than you had been feeding to your dairy cows in previous years?

[p. 380] MR. BIRD: I object on the grounds that it's vague. It's overbroad. You can answer.

THE WITNESS: Yeah. I could not say for sure.

BY MR. SHEPARD:

Q. Did you and Mr. Deutsch talk about anything else with respect to the amount of protein you were feeding to your animals, other than what you've told me?

A. Repeat the question.

Q. When you were talking with Mr. Deutsch about the protein did you talk about anything else other than what you've just told me?

A. I do not believe we did.

Q. Did you have any more discussions with Mr. Deutsch after the fall of 1990?

A. Yes.

Q. When was that?

A. In the summer of '91.

Q. And what was the occasion that you spoke to Mr. Deutsch in the summer of 1991?

A. Mr. Deutsch stopped off at the farm. It was on June 22nd, 1991.

Q. And what was the reason for Mr. Deutsch's visit?

A. I believe just a routine visit.

Q. [p. 381] What did you and Mr. Deutsch talk about that day?

A. I mentioned it to him that we had filed a lawsuit against Harvestore.

Q. Did he say anything to you?

A. We talked for about 15 minutes, yes.

Q. What did he say to you after you told him that you filed the lawsuit?

A. He told me that I was a good farmer, that my management was good, and that my problem was I wasn't filing it fast enough. He told me about this farmer down the road that, that has a lot of hired men and some full-grown sons, altogether about seven guys, and they have big equipment and they fill it very fast. And he told me that that man has always got good feed.

Q. Did you know the person down the road that he was talking about?

A. Yes, I did.

Q. Who was that?

A. John O'Laughlin.

Q. Was this the first occasion that Mr. Deutsch indicated to you that you weren't doing something right with respect to the way you were running the Harvestore?

A. Besides the few times that he told me that I should

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Q. [p. 384] And do you know anywhere I could look to find out what your milk production was in 1974, 1975, before you started using the Harvestore?

A. It should be on the DHIA papers.

Q. Do you know whether the DHIA records still exist for that period of time?

A. I don't know how far they went back. I do not have any records that go back that far. No. Wait a minute. I should say I don't have any records that go back that far.

Q. What happened to your milk production during that first year that you began feeding from the Harvestore silo?

A. The first year?

Q. Right. In 1975 and into 1976?

A. I believe my production went up.

Q. Do you recall how much it went up?

A. No, I cannot recall.

Q. How did your milk production, during that first year you were using the Harvestore, compare to what you had been led to expect when you bought the silo?

A. I believe that it was giving me what I was expecting, an increase in production.



Q. Did you get the additional three to five pounds [p. 385] of milk per day that Mr. Deutsch had told you about?

A. I believe -- I never sat down to figure it out, but I did get an increase in production.

Q. At the end of that first year of using the Harvestore silo, did you feel as though you had gotten what you expected to get in the way of milk production?

MR. BIRD: I'm objecting. Could you read that back?

(Question read.)

MR. BIRD: Didn't he just answer that question? I thought he just answered that question.

MR. SHEPARD: Well, he's told me he got some kind of an increase in milk production, and he hasn't told me how much. And he was made, Mr. Deutsch made a pretty specific statement about what kind of milk production. I'm just trying to find out if -- let me restate the question.

BY MR. SHEPARD:

Q. After using the Harvestore for that first year, did you feel you had gotten an increase in milk production that Mr. Deutsch had led you to expect you would get when you bought the silo?

MR. BIRD: And I objected because I [p. 386] thought he already answered that, Counsel.

THE WITNESS: Yes, I believe I got the increase that I was expected to.

BY MR. SHEPARD:

Q. Do you know what happened to your milk production in 1977?

A. I have no idea.

Q. Do you know whether or not your milk production went up or down or stayed the same after that first year of using the Harvestore?

A. I'm sure it went up and down. Up and down. I don't know the -- I don't know the trend it was going with.

Q. At the time back in 1977, you were receiving DHIA reports every month.

A. Yes.

Q. And those DHIA reports gave you a summary of your rolling herd average, didn't they?

A. Yes.

Q. Were you looking at those records when you got them?

A. To an extent, yes.

Q. And were you looking to see whether or not your milk production was going up or down?

A. Repeat that question?

Q. [p. 387] Sure. As a dairy farmer, were you interested to know whether or not your milk production was going up or down?

A. Oh, yes.

Q. Well, did you have any idea at all, say in 1977, whether your milk production went up or down compared to the previous year?

A. Well, we were in the process of enlarging our herd that year, '77, and so I do not know what the production did up or down. If it did stay the same, it would be expected because of the more numbers, hanging onto maybe some cows that we may should not have hung onto to fill the barn up once it was built.

Q. Well, at the end of 1977 how did your milk production compare to what you had been led to expect when you bought the Harvestore silo?

A. I guess I believe I was getting my production that I should have got.

Q. And in 1978 do you know whether your production went up or down?

A. I have no idea.

Q. At the end of 1978 how did your production compare to what you had been led to expect when you bought the silo?

[p. 388] MR. BIRD: I'm going to object. There is no foundation. He says he doesn't know what his production was. You can answer, if you feel you can.

THE WITNESS: I have no idea. I could not tell.

BY MR. SHEPARD:

Q. Was it your impression at the end of 1978 that your milk production was matching the level of milk production that Mr. Deutsch had led you to believe you could get from the Harvestore?

MR. BIRD: Objection as repetitious. He just answered that same question.

THE WITNESS: I cannot remember.

BY MR. SHEPARD:

Q. If I asked you that same question with respect to 1979, would your answer be the same?

A. Yes.

Q. Would your answer be the same with respect to 1980?

A. And the question is what?

Q. At the end of that year, the end of 1980, did yarmelke production match the expectation you had based on what Mr. Deutsch told you you could expect when you purchased the Harvestore silo?

A. [p. 389] I can't remember.

Q. And would that be your response for '81 as well?

A. Yes.

Q. And would that be your response for 1982?

A. Yes.

Q. Did there ever come a time when you felt that your milk production was not achieving the level you had been led to expect when you bought the Harvestore silo?

MR. BIRD: I'm going to object to that. It assumes certain facts not in evidence.

BY MR. SHEPARD:

Q. You can go ahead and answer.

MR. BIRD: I think it's an unfair question.

THE WITNESS: Repeat the question?

BY MR. SHEPARD:

Q. Sure. Did there ever come a time when your milk production was not what you expected it to be based on what Mr. Deutsch had told you when you bought the Harvestore?

A. No.

Q. One of the other things that you mentioned was that Mr. Deutsch had indicated to you that you could expect more money and more profits from using the

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[p. 397] understood any of these questions.

BY MR. SHEPARD:

Q. Do you understand my question?

A. Repeat it one more time.

Q. Okay. All I'm trying to find out here is, did you have any herd health problems on the farm at any point since 1975 other than, I mean, the typical, kind of run-of-the-mill health problems that every farm has?

MR. BIRD: Are you asking for his--

THE WITNESS: Let me answer that then. Okay. You have to understand that there is more than haylage in my ration. There is more than high-moisture shell corn. There is baled hay, there is corn silage.

So if I did have a problem, I would not for no reason think that it come from the Harvestore, because there is many other things. There is weather, there's crop condition. There's other things that, if there was a problem, there was no reason for me to think that it was the silo.

BY MR. SHEPARD:



Q. There were a number of things other than the Harvestore silo that could contribute to a health

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[p. 399] thing as a period or a year where you don't have anything. Okay. Were there any periods where -- and I understand what you've just said, that you're always going to have some mastitis in the herd. Is that correct?

A. Yes.

Q. Were there any years when you had what you considered to be a disproportionate number of cases of mastitis in your herd?

A. I'd have to say no.

Q. Even now, looking back, are there any periods of time when you believe you had a disproportionate number of cases or mastitis in your herd?

A. No.

Q. Are there any herd health problems that you had from 1975 till 1991 that you now believe were caused by the Harvestore silo?

A. Repeat that question

Q. Sure. Are there any herd health problems that you had from 1975 to 1991 that you now believe were caused by the Harvestore silo?

A. What I know now?

Q. Yes.

A. Yes.

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[p. 401] MR. SHERAN: Blake, how does he define a high somatic cell count? At what level?

BY MR. SHEPARD:

Q. When you refer to a high somatic cell count, what do you mean by a high count?

A. Six hundred.

Q. About 600,000?

A. Yes.

Q. Were there times before 1990 when you had somatic cell counts above 600,000?

A. I'm sure there was.

Q. Do you attribute those periods of high somatic cell counts to the Harvestore also?

A. What I know now? Yes.

Q. When you had -- well, let me ask it a different way. Has anyone told you that the period of high somatic cell count were caused by the Harvestore silo?

A. Yes.

Q. Who has told you that?

A. Dr. Bill Olson.

Q. And did he tell you that in 1991 when he came to the farm?

A. Yes.

Q. Has anyone else other than Dr. Olson told you [p.402] that?

A. No.

Q. Before 1991 when you had periods of high somatic cell counts, did you discuss those with any of your treating veterinarians?

A. Before 1991?

Q. Yeah.

A. Well, let's forward that to, before March 11th I had talked to somebody, in 1991, to the veterinarians.

Q. Who did you speak to before March 11 of 1991?

A. Dan and Steve Kreuser.

Q. When did you speak to them?

A. When?

Q. Yes.

A. March 6th, 1991.

Q. How is it that you remember the date March 6th?

A. Because it was on a Wednesday I went in there because I had high somatic cell problems, and the creamery told me I was supposed to do something about it. And I took my DHIA papers there, and we looked them over and they did some, we talked and discussed it for a while. And then they told me that the following Monday, March 11th, they were going to come out to the farm and pull blood

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A. [p. 412] On and off through the years. We've had the diarrhea or --

MR. BIRD: What was that you said? The what? Diarrhea?

THE WITNESS: Diarrhea.

MR. BIRD: I thought he was asking you about respiratory problems. You on the wrong end?

THE WITNESS: Am I on the wrong end? What you call it in the back end? I don't know.

MR. BIRD: Well, all right.

BY MR. SHEPARD:

Q. When you said respiratory problems, are you talking about problems with diarrhea and that sort of thing?

A. Yeah. We occasionally had some small cases of it, yes.

Q. Do you mean digestive problems or--

A. We had some digestive problems, too. Yes.

Q. Well, let me ask you this just so I make sure I've covered respiratory problems. Were there any problems with, you know, the lungs or the breathing of the animals?

A. No, not that was noticeable.

Q. Tell me what problems you had with diarrhea and the digestive problems.

A. [p. 413] Well, occasionally, once in a while a cow would come in and she would be very loose and the manure seemed to be more on the darker side.

Q. When did you first notice that?

A. Now and then in the barn I seen some cows that seemed to be a little worse than others.

Q. Okay. When did you first notice that?

A. I'd have to say go back a few years. I couldn't say for certain when.

Q. Well, would it be 1980?

A. Yeah. That's possible, somewhere in there, yes.

Q. Well, could it have been sooner than that, earlier than that?

A. No, I think that probably would take care of it.

Q. Was that something you had ever seen in your dairy herd before then?

A. You mean the diarrhea?

Q. The diarrhea and the loose stools?

A. Yes. We seen is occasionally. Sometimes they call it a winter dysentery. In other words, it seems to go through the barn sometimes.

Q. Well, was there anything that you began noticing in 1980 that was worse or different than what you had experienced with your dairy herd before then?

A. No, I'd say nothing that was worse.

...

[p. 415] around at that time.

Q. Do you know whether or not there were any records--

A. No, I would not. No, I wouldn't know.

Q. The next thing that I have on my list here that you mentioned in the way of herd health problems was low feed intake. Tell me when you first noticed that.



A. Over the years we'd have cows that went off feed.

Q. When did you first begin to have problems with that?

A. It's been so long I don't remember when it was, but I guess I'd have to say ten years ago.

Q. When you say cows off feed, what do you mean by that?

A. Well, they refuse to eat the feed. It seems like they'd do it for a day and then everything was back to normal again. Just seemed like they kind of went off feed for a day or so and then they --

Q. Did you have a total mix ration mixer?

A. We do now.

Q. When did you get that?

A. In the spring of 1990.

Q. When these cows went off feed was there anything in particular that they would refuse to eat or would [p. 416] they just refuse to eat altogether?

A. I guess they just pretty much refused to eat. Baled hay. They always liked baled hay, but they refused everything else it seemed.

Q. How frequently did you have problems with cows going off feed beginning with, let's say, ten years ago when you first noticed the problem?

A. How frequently?

Q. Yes.

A. Maybe one or two cases a week.

Q. Well, before that time had you ever had any cases of cows going off feed like that?

A. Yes, I believe over the -- yes, I'd say we had some, some cows that went off feed.

Q. Well, did the frequency of these cows going off feed increase beginning ten years ago compared to what your experience had been before that?

A. Yes.

Q. Did you consult with a veterinarian or anyone else about the situation?

A. Oh, we did talk to the feed man about it, mentioned it to him.

Q. Who was that?

A. Mark Koepp.

Q. How do you spell his name?

A. [p. 417] K-o-e-p-p.

Q. Who does Mr. Koepp work for?

A. Prairie Farm Supply in Belle Plaine.

Q. How long was Mr. Koepp your feed man?

A. I'd say maybe half a dozen years, six years.

Q. And when did he stop?

A. No. He still is.

Q. Oh, he still is.

A. Yes.

Q. So you've been using him for about the last six years?

A. Yes, I'd say something very close.

Q. When did you first talk to Mr. Koepp about the problem with the cows going off feed?

A. Well, he used to stop by about once a month. And he did my rations and he would, he'd talk about the amount of feed the cows were eating. And if he thought we were feeding too much of one thing or too much of another, we seemed to make adjustments in the rations then.

Q. When did you first mention to him this problem with cows going off feed?

A. Well, when I first started. I guess I started when he first came onto the job. This was always a thing, to achieve production you had to get a cow [p. 418] to eat a lot of feed, so you do feed a cow all she wants to eat.

Q. When you discussed this with Mr. Koepp what did he tell you?

A. Well, usually the remedy seemed to be you backed off the feed for a day or two and then away they go again.

Q. And is that basically how you treated the problem?

A. Yes. Yes.

Q. And did that seem to work?

A. Unless the cow had a DA problem, that would solve the problem.

Q. Before discussing this with Mr. Koepp did you talk to anyone else about this problem with cows going off feed?

A. There was previous feed salesmen, but I can't remember their names. But they always came in the barn whenever they come for a visit. And that was their job, to balance the ration, and try and balance it so that the cows would eat it.

Q. Well, when you first started noticing that you were having more frequent problems with cows going off feed around ten years ago did you talk to your feed man at that time about it?

A. Yeah. I guess I'm sure I did.

Q. [p. 419] Do you remember who that person was?

A. We've changed feed men. Years ago we used to, every couple years it seemed you'd find a different feed man

come down the road. But to pinpoint which one, I couldn't even tell you right now.

Q. Did any of the feed men that you talked to about this problem ever indicate that the problem was related to problems with the Harvestore feed?

A. No.

Q. Did any of them ever indicate that it was related to the quality of the feed that you were feeding to your animals?

A. No.

Q. Did they give you any indication of why the cows were going off feed?

A. No, they didn't. They would balance the ration, maybe add more buffers and things, make a cow eat more of the feed.

Q. What was your understanding as to why the cows were refusing to eat?

A. I guess I just, just for the simple reason that we thought, well, must have fed her too much. We kind of took everything away and then they just took off again.

Q. Has anyone told you since that time that these [p. 420] problems are related to the Harvestore feed?

A. No.

MR. VICK: Excuse me. I believe you used calves again when referring to cows. You just need to watch that.

BY MR. SHEPARD:

Q. Do you remember ever talking to any of your veterinarians about this issue?

A. The only time that we would talk to a veterinarian about off-feed would be when they had a twisted stomach and you had a sick cow that needed veterinarian care. And then we talked about, well, today she's not eating. She hasn't eaten for two days.

Q. Let's talk about the twisted stomachs for a minute, as long as we're on the subject. When you talk about DAs you're talking about the same thing as twisted stomachs, correct?

A. Yes.

Q. When did you first start having problems with twisted stomachs?

A. Oh, that's many years ago. You'd have to go back to probably when we started with the haylage, or to chopping of fine feeds, the roughages.

Q. And would that have begun around 1975?

A. [p. 421] I imagine around that area, yes.

Q. Have you had those problems before then?

A. No.



Q. Who did you talk to if anyone about that problem when you first started having problems?

A. Well, that was basically with our veterinarian. That was his concern, I guess. That would be the man we talked to.

Q. Was that Dr. Mittelsted?

A. Dr. Mittelsted at first, yes.

Q. What did Dr. Mittelsted tell you about the problem?

A. He didn't -- at that time I don't believe he told me where it was coming from. We didn't know where it was coming from.

Q. Was he the one who told you about the relationship between twisted stomachs and the fine chopped feed? Or was that someone else?

A. I believe it had to be the next veterinarian in line probably, because I don't believe Mr. Mittelsted told us that.

Q. Who was it that told you about the relationship between the chopped, fine chopped feed and twisted stomach?

A. Richard Klimmek.

Q. [p. 422] Do you remember when you talked to him about that issue?

A. Well, he's been my veterinarian probably -- I guess somewhere in the late '70s he started.

Q. Do you recall that he made this association between fine chopped feed and the twisted stomachs sometime in the late '70s?

A. Yes, I believe so.

Q. Have you talked to anyone else other than Dr. Mittelsted and Dr. Klimmek about that problem?

A. Well, over the years every time a veterinarian came to do an operation or something I'm sure we talked about it and what caused it. And I think a lot of them -- every farmer's got different rations, different feeds, so I don't know what they really were tying it to.

Q. Have any of your veterinarians or has anyone else told you that the twisted stomachs are caused by Harvestore feed as opposed to any other form of finely chopped feed?

A. No.

Q. Has Dr. Olson ever indicated that to you?

A. I would say he has not.

Q. And I think we talked about this yesterday, but am I right that you treated the problem of twisted

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[p. 427] with uterus infections. Been a long time.

Q. Did you have some problems with uterus infections prior to 1975?

A. Yes, we had some problems.

Q. Were the problems with uterus infections better or worse or the same after 1975?

A. Well, for the amount of animals we had, I'd say we had more uterus infections than we had before.

Q. So even considering the number of cows you had, you had a higher percentage of --

A. Yes.

Q. -- incidents of uterine infection?

A. Yes.

Q. When did you first begin to have an increase in the number of uterine infections?

A. You'd have to go back many years. I guess I'd say -- it's hard to pinpoint the year. I'd say probably in the early '80s, somewhere there.

Q. Did you talk to anyone about those problems when they arose?

A. I believe I talked to the feed salesman about it, several times, because we always felt that they're lacking some type of a vitamin or something. That's why they are having these problems.

Q. Who do you remember talking to?

A. [p. 428] Well, just about any feed salesman that we had out there. That's usually one question they will ask you before they balance the ration is if you're having these problems, and then they kind of throw in a little bit more of this or a little bit more of that.

Q. Is that something that you talked to your feed salesman about in the early 1980s when you first began to notice this increase?

A. Yes.

Q. Do you remember who it was at that time that you talked to?

A. Right offhand, I couldn't tell you who it was.

Q. What did you do to treat those problems that you had?

A. The veterinarian treated some of them, and then they used to leave me off some medication that I would treat them myself.

Q. What did the vets do to treat them?

A. We call it infuse. They infused some medication.

Q. Do you know what the medication is called that they used?

A. I believe they used Nolvasin and Furacin.

Q. Is that the same medication that they left you?

A. Yes.

Q. [p. 429] Did you understand there to be any sort of a relation between uterus infections and milk production?

A. When a cow has a uterus infection she's usually not feeling very good, and when she's not feeling very good she's not going to milk. So I would have to say there is a correlation, yes.

Q. Did any of your vets or feed salesmen ever indicate to you that this higher rate of uterus infections was related in any way to the feed that you were feeding your animals?

A. Not what I was feeding, but they felt I must be lacking something is probably what is more likely, I guess.

Q. Did any of them ever blame the problem on the Harvestore feed?

A. No.

Q. What vitamins did your feed salesmen add to the ration, if any, to deal with that problem?

A. Always vitamins and minerals, but they always increased the Selenium. They thought Selenium was a big help in that end. And vitamin A, D and E was the --

Q. Did those changes in selenium and vitamins help to address that problem?

A. [p. 430] It does help, yes.

Q. Has anyone else ever indicated to you that those incidents of uterus infections were related to the Harvestore feed?

A. No.

Q. You also mentioned that you had some foot problems. Can you tell me what the foot problems were that you had?

A. The hooves seemed to grow, I don't know, just fast and weird, I guess it was. They seemed to have a lot of foot trouble.

Q. When did you first begin to notice that?

A. We've noticed that for probably the 1980s.

Q. Since around 1980?

A. Yes.

Q. Why was that of concern to you?

A. Foot problems?

Q. Yeah.

A. Well, it tells you how many years that cow is going to be around. If you got a cow that's got bad feet, she's not going to milk good and she's not going to be around very long.



Q. I'm just trying to understand what the relationship is between foot problems and milk production. Is it because the cow won't be comfortable or --

A. [p. 431] It's a big factor because the cows, if they got to stand there, if they're sore on their feet, they don't eat and they won't do a lot of things.

Q. And ultimately then that can have a bad effect on milk production; would that be right?

A. Yes.

Q. Who, if anyone, did you talk to about that problem?

A. I believe the feed salesman was involved in that too a little bit as far as the Selenium and those things. They tried to keep the levels as high as they possibly can in the feed ration.

Q. So did your feed salesman at that time when you first began to notice the problem prescribe additional Selenium?

A. Well, they prescribed maybe several things. There's other minerals too that they all throw in there. I don't know what they all throw in there.

Q. Do you remember who the feed salesman was at the time when you first brought it up?

A. No, I couldn't even begin to know.

Q. Did any of your feed salesmen ever indicate that the foot problems you were seeing was related to the feed in any way?

A. I believe -- well, I guess I can't answer that, [p. 432] because I don't know. Over the years I guess it was never -- no, I'd have to say it was never mentioned that the feed had something to do with the feet problems.

Okay. Yeah. I mean, yeah, they put their minerals and that in, but as far as my homegrown feeds having any effect to it, I don't believe, they never mentioned anything.

Q. Has anyone else ever mentioned that to you, that there was a connection between your homegrown feeds and this foot problem?

A. No one has ever mentioned it, no.

Q. And, I gather from that, no one has ever mentioned that this was related in any way to the Harvestore feed.

A. No one has ever mentioned that.

Q. Did you do anything else to address the hoof problem? Did you hire a hoof trimmer?

A. Yes, we do have a hoof trimmer.

Q. Who is the hoof trimmer that you have?

A. Vic Larson.

Q. When did you first get in contact with Mr. Larson about coming to your farm?

A. The records would indicate it, but I believe probably about ten years he's been doing it now.

Q. [p. 434] Was that something that was arranged by one of your attorneys?

A. I understand that, yes.

Q. What happened when Mr. Scott came out to the farm?

A. Well, we were milking cows yet that morning, and he just walked around the barn and looked at the feet and we had a conversation. He looked at the feet, yeah, and we had conversation, and he probably was there a half hour.

Q. What did you talk about when you had the discussion with him?

A. Just basically the history of the cattle and the history of the health of the cows.

Q. What did Mr. Scott tell you?

A. Well, he looked at the feet and he thought that some of this growth on the hooves come from spoiled feed.

Q. Did you say he looked at the feet or the feed?

A. Feet. The hoof.

Q. Did he tell you why he thought the problem with the hooves was related to the feed?

A. Well, he had some reason, I don't understand what it was, that he could tell that some of these cows had got, somewhere in their life had gotten spoiled feed.

Q. [p. 435] Are you still having a problem with hooves?

A. We still trim yet now, yes.

Q. Is hoof trimming an unusual thing to have on a farm?

A. It's getting to be more common than years ago. Nobody used to do that.

Q. Did Mr. Scott say anything else about the health of your animals, other than what he told you about the connection between spoiled feed and the hooves?

A. He looked at the condition of the cows and, like I say, I cannot say what he said because I do not remember what was talked about.

MR. SCHMITT: You said calves.

THE WITNESS: Did I say that again? Cows. Cows.

BY MR. SHEPARD:

Q. Do you remember anything he said about the condition of the cows?

A. He thought they looked pretty good.

Q. Did he indicate that to you?

A. Yes

Q. Do you remember anything else about your discussion with Mr. Scott?

A. No.

Q. Did Mr. Scott make any sort of connection between

Q. [p. 436] Harvestore feed and the hoof problem?

A. Yes, I believe he did.

Q. I gather he was the first person that ever made that connection?

A. Yes.

Q. Did Mr. Scott make any sort of connection between some of these other health problems that we talked about and the Harvestore feed, such as the diarrhea problem?

A. We basically only talked about the hooves that day. I mean, we maybe talked other subjects, but that would be the only thing that I can remember because I was milking at the time. And we talked about the feet and that was just about everything.

Q. When did you first notice any problem with bad legs?

A. That was many years ago too. We used to get these cows that would get these, it's on the hind leg. They get this lump on the side of the leg or a big bruise, looked like bruises. I don't know where it come from.

Q. This would be bruises on the hind leg?

A. Well, yeah. The joint of their knee would swell up is what it looked like, yes.

Q. When did you first -- can you give me an idea of [p. 437] how many years ago this was? Is this around 1980?

A. Well, I remember when we were adding on to the barn in '77, we had a couple cows in the barn then that had just huge, looked like a great big softball sitting right on that joint there. Because I know the first cow moved into the new barn had one of those things on there.

Q. Had you ever seen anything like that before?

A. I'd have to say no, I guess. No.

Q. Can you give me an idea of how common this problem was with the swelling or bruising on the hind legs?

A. It seems it happened more on the younger heifers when they were brought into the barn, that they would -- oh, I'd have to say maybe, we'd have maybe three, four, five cases a year, something like that.

Q. Did it happen at all with the dairy cows?

A. Oh, yes. Well, yeah, this is the dairy cows. It was a heifer that was ready to calve and we brought him in at calving time. Older cows didn't seem to do it so much as the younger.

Q. And have you continued to have problems with about three to five cases per year since around 1977?



A. Repeat that question?

Q. [p. 438] Yeah. I'm sorry. It's not a very good question I think I'm getting tired. I thought you said that you had about three to five cases a year that you noticed this problem with heifers.

A. When I say heifers, I'm talking about first calf heifers is what I mean. Heifers when they come into the milking barn, yeah.

Q. And has that been pretty much your experience in terms of how many animals you've had with that kind of a problem over the years?

A. Yes.

Q. Did you talk to anyone about that problem when you first noticed it?

A. Well, the veterinarians, we had done surgery on a few of them over the years, and most of the time we just leave it alone. It's been discussed, but nobody seems to know where it comes from.

Q. Has anyone ever indicated to you that it's related to feed?

A. No.

Q. Or has anyone ever indicated to you that it's related to the Harvestore?

A. No.

Q. Why do you think that those problems were caused by the Harvestore?

A. [p. 439] Did I say they were caused by the Harvestore?

Q. Well, I thought when you gave me this list of problems these were things that you thought today had been caused by the Harvestore feed. Maybe I misunderstood that.

A. Well, if you look back now, over what I know now, when I look back over the years and if this was going on all these years, I believe definitely it had a lot to do with the Harvestore feed.

Q. Okay. Why is that?

A. Because maybe there was a lot more spoilage going on than what I thought was going on.

Q. Well, is there some relationship between spoilage of feed and this leg condition that you're talking about?

A. I can't say yes or no, but all I know is I had more foot problems and more leg problems and more health problems than I had before.

Q. Did you discuss this issue of bad legs with Larry Scott when he was on your farm?

A. I'm sure it was talked about. Like I say, he did a lot of observing. I don't remember what he all talked about. He looked at my DHIA records, the reproduction records,

which is all on the DHIA sheets. And what he came to a conclusion, I really [p. 440] couldn't say.

Q. You also mentioned that you thought the cows were too thin. Do you remember that?

A. Yes.

Q. When did you first notice that the cows were thin?

A. I guess I really notice it now, presently. When my cows are healthy, they're fleshy and they carry a real good condition. Before that, my cows seemed to be on the thin side.

Q. I believe when we were talking about your experience with the using the milk parlor you indicated that you thought the cows were thin when they went in, but that they got thinner during the time that you were using the milk parlor.

A. Yes. It seemed to be, yes.

Q. And was that true in 1977 and '78, the first time you used the milk parlor?

A. Yes.

Q. And was that also true in the summer of 1988, the second time that you used the milk parlor?

A. That the cows seemed to be thinner?

Q. Yes.

A. Yes.

Q. And was that also true in 1990 when you used the milk parlor for the third time?

A. [p. 441] Yes.

MR. VICK: I'd like to take just about a two-minute break. It appears to me that Mr. Klehr is getting a little bit glazey-eyed. I want him to maintain his attention.

MR. SHEPARD: That's fine.

(Brief recess.)

BY MR. SHEPARD:

Q. Mr. Klehr, we've got 17 minutes to go here. Did you ever talk to anyone about your observations relating to the thinness of your cows?

A. The feed salesman. There was conversation all the time. They usually looked at the condition of the cows, and then from there they would tell you if you needed more grain or more haylage or more protein, or whatever they thought the ration was, to adjust for the cows.

Q. Do you remember whether any of the feed salesmen confirmed or made a comment to you that they thought your cows were unthrifty or thin?

A. Yes. I'm certain that they observed the unthrifty cows or the thin cows, yes.

MR. BIRD: Hold on. Can I just have a minute with him?

(Off-the-record discussion.)

[p. 442] BY MR. SHEPARD:

Q. Do you recall when it was that your feed salesman first commented to you that they thought your cows looked unthrifty?

A. Well, that goes back many years. It will depend on the lactation of the cow. And they don't only look at the condition of the cow, they look at the pounds of milk the cow is giving, they look as to how they're holding their lactation. And so they take a lot of things into consideration when we discussed this problem of a thin cow. So it goes back to probably when you had your first feed salesman, because that's what he's there for.

Q. So would this have been back to sometime, I mean, would it have gone back to before 1980 sometime?

A. I believe it would be in that range there somewhere, yes. Probably back -- as far as the consulting feed salesman and that, it probably went back before that.

Q. And you make a good point there. When you're talking about thriftiness of a cow, a cow's weight can depend on the cow's production and where she is in the lactation cycle and that sort of thing.

A. That's right.

Q. But as I understand it, what you were saying is [p. 443] that the feed salesmen, when they considered all of these various factors, expressed to you a comment that they thought your cows were less thrifty than they should have been?

A. Yes.

Q. Do you remember who those feed salesmen were who made those comments to you?

A. I would say Mark Koepp would have been one of them.

Q. And that would have been sometime in the last six years?

A. Yeah. Yes.

Q. And would there have been someone -- I mean there would have been someone before then. Do you recall who it would have been?

A. Oh, it's hard to say, because years ago we used to jump feed stores more often. We probably, a lot of them have gone broke or closed up, closed the doors, and so we probably switched once a year maybe. It wasn't so consistent as what we are now. We seem to be sticking with -- I really couldn't say who I have talked to before that.

Q. Do you recall any of your feed salesmen or anyone else ever telling you that there might be some relation between the unthriftness of your cows and [p. 444] the feed from the Harvestore silo?



A. No.

Q. Did anyone ever indicate to you what they thought was the cause of the unthriftiness?

A. No. At the time they thought they'd increase a little bit more grain or a little bit more feed. They're not getting enough into them. They thought in that range, yes.

Q. What is the reason that you now believe that those problems were caused by the Harvestore?

A. What I see now is, I believe that the feed value that was in the Harvestore the cows did not utilize up the way they should have.

Q. And why do you say that?

A. Because maybe the feed value wasn't there to be utilized.

Q. Why is it that you question whether or not the feed value in the Harvestore feed was there back in that time period?

A. Because -- repeat that question?

Q. Yeah. I'm sorry. It wasn't a very good question. Is there some reason you now believe that the feed value from the Harvestore feed was lower than it should have been?

A. Well, now, the only thing I've changed is to remove [p. 445] the haylage and gone to all baled hay. And my cows do hold their condition very well.

Q. Had you ever had a problem with unthriftiness in your cows before 1975?

A. I'd have to say not.

Q. Okay. I've only got two things left on this list. One of those is rough hair coats and the other is dull eyes. When did you first notice that your cows had rough hair coats?

A. My cows never -- I guess you look back now over the 15 years, what I see now what's going on in my cows now, the shininess, the slick hair coats, that was something I never seen in my barn for a long, long time.

Q. Well, was there a difference in the appearance of your cows after 1975 than there was before 1975?

A. Yes. I believe so, yes.

Q. And after 1975 I guess you're telling me that the cows appeared to have rougher hair coats than they had before 1975?

A. They just did not shine or look as nice as they do now or as nice as they did before 1975.

Q. Did you ever talk to anyone about that?

A. That fell under the feed nutritionist guy, and I'm certain the thin cow -- the rough coat, with the [p. 446] dull eyes, was all tied in with the thin cow.

Q. Do you recall discussing this with your feed salesman sometime back in the late '70s?

A. I'm certain that every time they came out for a visit we went over the ration and they basically would check the cows, look at the volume of milk. And they would take into consideration the thinness and the roughness of the cow, that they knew that these cows were still lacking something.

Q. And you had discussions with one or more of your feed salesmen back in the late '70s or early '80s, sometime in that time frame?

A. Oh, yes, I'm certain I did.

Q. Do you remember who?

A. No, I would not remember.

Q. And finally -- well, let me ask one more question about the rough hair coats. Has anyone ever told you that the rough hair coats were caused or related to feed from the Harvestore silo?

A. No.

Q. Okay. Dull eyes. When did you first notice a problem with dull eyes?

A. It's like everything else; now, when you see a healthy cow and you look back, a healthy cow's eyes just shine. The cows' eyes never had that gloss [p. 447] to them that they have now.

Q. And were the eyes of your cows shinier or brighter before 1975 than they were afterwards?

A. I would say so, yes.

Q. And again, did you discuss this issue with the feed salesman at some point when you noticed the problem?

A. Well, yes. That was, like I say, when they come out, that was like a health check they did on the cows. And so that was all tied into their body condition. Maybe not individually talked about the eyes, but they looked at the condition of the cow, they looked at the nose to see if the nose was runny and if they had snotty noses or if they had any problems. That was sort of like their duty, yes.

Q. Did you talk about either the rough hair coats or the dull eyes with Larry Scott when he was visiting your farm?

A. I don't believe we touched on that at all.

MR. SHEPARD: This might be a good place to stop.

MR. VICK: Is that all right with you?

THE WITNESS: There is one more issue I would like to talk about on the health problems.

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[p. 459] record.

(Off-the-record discussion.)

BY MR. SHEPARD:

Q. Mr. Klehr, was there a reason why you used bulls for cleanup during these two or three different periods that you recall?

A. Well, we had some cows it just seemed we could not get settled AI, and then we ran the bulls sometimes with the heifers for a short period of time.

Q. So you used the bulls to breed the heifers and to do cleanup on the dairy cows?

A. Right.

Q. Before 1975 when you started feeding out of the Harvestore, had you used AI or did you use bulls or both?

A. We used very few bulls, mostly AI.

Q. Do you recall a period before 1975 where you used bulls for breeding?

A. I was quite small. I was probably like 15, 16 years old. My dad built a bull shed behind the barn, a separate building for them. And so that was probably 32 years ago.

Q. After you moved onto the farm in 1969 until 1975 when you started feeding out of the Harvestore, did you use a bull for breeding purposes during that [p. 460] time period at all?

A. From what time period?

Q. From '69 until 1975?

A. I would have to say no.

Q. Can you give me an idea of when you first began using a bull for cleanup?

A. I could not tell you the years. The breeding books will show exactly when the bulls were around.

Q. Where did you purchase the semen that you used for artificial insemination?

A. From about three or four different AI studs, ABS, 21st Century, earlier it was MVBA. Years ago we used to breed the Curtis.

MR. BIRD: Who?

THE WITNESS: It was Curtis, not Curtis candy, but it was Curtis Breeding. And Select Sires. There is a couple studs now that sort of merged together --

MR. BIRD: Wait a minute now. Are you answering his question or are you going on to something else?

THE WITNESS: No. Still trying to get names of different, but like Sire Power is another one, too.

BY MR. SHEPARD:

...

[p. 463] come out and sell you the semen?

A. Just come out and sell the semen.

Q. You mentioned, I think, last week that you did have some problems with reproduction or breeding at some point over the years. Is that accurate?



A. Yes.

Q. When did you first begin to have problems with reproduction?

MR. BIRD: I wouldn't guess. If you can't recall, it's in the records.

THE WITNESS: No. I'd be guessing.

BY MR. SHEPARD:

Q. Well, do you have a recollection of any specific problems that you had over the years? I mean, are there specific things you recall having problems with?

A. Calving intervals. Long calving intervals.

Q. When you say long calving intervals, what in your opinion was an unreasonably long or unnecessarily long calving interval?

MR. BIRD: I'm going to object to that as argumentative. If you know what he means by unreasonably long or unnecessarily long, you can answer.

THE WITNESS: No. I wouldn't know what [p. 464] he means.

BY MR. SHEPARD:

Q. Well, I asked you what the problem was and you said one of the problems was you had long calving intervals. What did you consider to be a long calving interval?

A. Well, relating to the county and state averages, mine were way higher than that.

Q. What were the county and state averages?

A. It will show in the back of our DHIA summary books that we get every year what the state average is and what the county average is.

Q. And do you recall that at some point from between 1975 and 1991 your calving intervals were longer than the state or county averages?

A. Yes.

Q. Can you be any more specific about when your calving intervals exceeded the state and county averages?

MR. BIRD: Without looking at the records, right?

BY MR. SHEPARD:

Q. Yes.

A. I'd be guessing.

Q. And where would I go to see what your calving [p. 465] intervals were? Your DHIA records?

A. Oh, yes.

Q. So if we wanted to compare, if we wanted to find out when you were having problems with your calving intervals, where would I look to find that out?

A. I imagine the state has its own -- at the end of every year we have our DHIA meeting, annual meeting for the county, and they always send out a little booklet. And in the back page it always says the state average, county average and then your average.

MR. BIRD: Your meaning not year, but your.

THE WITNESS: Yeah. In other words, it says your on the top.

MR. BIRD: Y-o-u-r.

THE WITNESS: For years they left that blank, empty, so that you can fill it in yourself, because the DHIA will just about tell you what it is. But the last two or three years now they've been sending out a separate piece of paper with my name on it.

So in other words, nobody else can see what my average is. So it's sort of a personal thing. But they give us that piece of paper that

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Q. [p. 468] When you say very poor conception rate, what do you mean by that?

A. Well, percentage of conception rate.

Q. And is that something that is reported on your DHIA records also?

A. Yes, it is.

Q. And was there a percentage that you strove for or that you thought you should be obtaining?

A. Much higher than what I have been getting, yes.

Q. What, in your mind, is an acceptable percentage of conception?

MR. BIRD: At what point in time?

MR. SHEPARD: Well, let's talk about today first.

MR. BIRD: First service, second service, third service?

BY MR. SHEPARD:

Q. He can tell me.

A. I believe 75 percent conception rate would be a fair figure.

Q. And is that what you felt you should have been obtaining over the years since you put the Harvestore on?

A. That is very close to what I was achieving before I built the Harvestore.

Q. [p. 469] And how do you know that?

A. Well, when I went to AI school the first year, that was in the 70 to 80 percent conception rate.

Q. When did you go to AI schools?

A. In 1967.

Q. Was that just that one year?

A. Yes.

Q. And how do you recall what your conception rate was then?

A. Well, I mean, we -- I guess the books would probably show for it, but whenever one repeats we usually go back and mark an X at the previous service that she was. And I know a few years after I had gotten into AI we had talked to these guys that came around selling semen and this and that and other people, and I know that I was in that range of 75 to 80 percent.

Q. And that was back around 1967 or '68?

A. Yes. Or a few years later, yeah.

Q. Was there a time when you noticed that your conception rate began to decrease?

A. Over the years. It's been a long time, you know, but it doesn't, just like a light switch it doesn't hit you overnight. You slowly go into this thing and you don't know at what point, and all of a

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[p. 471] I wanted to go back to 1970. If, you had these AI schools in 1967, I think we ought to at least go back that far if you still have those.

A. Okay. I will check.

Q. Can you bring those with you if you've got them?

A. Yes.

Q. Are there any other problems other than the long calving intervals and the poor conception rates that you recall that relate to your breeding program?

A. Uterus infections.

Q. Tell me what kind of problems you had.

A. Well, it starts with not, we call it clinging, but hanging on to their placenta. And then eventually you have uterus infections and those things seem to really tie into breeding problems.

Q. And when you had these uterus infections, was there a corresponding increase in problems getting those animals rebred?

A. Oh, yes.

Q. Had you ever had a problem with uterus infections before 1975 when you began using the Harvestore?

A. I believe that there was some problems, yes.

Q. Did the problems become more frequent after 1975?

A. I would say yes. What I know now, yes.

Q. [p. 472] When did they begin to get worse?



MR. BIRD: If you can recall.

THE WITNESS: I could not pinpoint the year. It's been a long time.

BY MR. SHEPARD:

Q. Well, was it ten years ago?

A. Yes. I would say somewhere in there, yes.

Q. When you began to have these problems with uterus infections what did you do to address it?

A. Well, years ago the vets used to do the infusion, but now they drop us a bottle off and we basically infuse our own cows.

Q. Is there anything else other than giving cows an infusion that you have done to try to reduce the number of uterus infections?

A. Well, the last few years they're using Lutalyse. It's some type of a hormone thing that makes them contract their uterus together.

MR. BIRD: L-u-t-a-l-y-s-e. I think. Isn't that right? Blake ought to know.

BY MR. SHEPARD:

Q. Other than using those hormones and the infusions, is there anything else you've done in the way of management changes to try to reduce the number of uterus infections?

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[p. 475] but we never considered it a problem at that time.

Q. Had you ever had a problem like that before 1975?

A. I cannot remember.

Q. When you say before 1991 you had one or two cases a year before then, did you have incidents like that ever since you began using the Harvestore?

A. Well, sometimes you don't know where to tie it to; is it an abortion or some cows maybe just can't carry their calves a full term. I guess over the years we maybe had one or two every year that come in around eight and a half months or something, and you make nothing of it because you thought, well, maybe Mother Nature don't want her to go all the way. So I'm sure over the years we've had some cases of this, yes.

Q. Okay. I understand that. I'm just trying to get a sense of when you recall first observing that this was happening. And as I understand it, are you saying that it began to happen sometime right after you began using the Harvestore?

A. I can't say definitely. Abortion is something that, I guess it's a signal from Mother Nature that things ain't going right probably. And so I don't know, we've probably had some before we had the Harvestore. I'm certain most farmers had some [p. 476] abortions, a few.

Q. Okay. Well, whether you were observing abortions or early calving, whatever the problem was, had you

observed this problem from the time you started using the Harvestore?

A. I guess over the years I never made it a big issue, because I didn't know what was causing this cow to do this. And we don't have a whole string of them; we have one maybe every six months and you thought maybe she slipped and fell or something and lost her calf that way. So I guess when it started, I could not tell you when it started.

Q. Well, have you learned something recently that indicates to you that these problems over the years were caused by the Harvestore?

A. The experience we had in 1991.

Q. How many incidents did you have in 1991 of a cow calving early?

A. I could not tell you the exact number, but when the milk cows were taken off of haylage, the heifers, the young stock and the dry cows still stayed on it for probably, I'd say all of two and a half months probably, into about midsummer. And the dry cows with the heifers, that bunch that was out there, almost, a lot of them came in two weeks early. [p. 477] Some of them were only dry a week. Some of them maybe came in a month and a half too early. We just didn't know what was going on. But now when we look back we know what happened.

Q. I guess what I'm trying to find out is, when you say now that we look back, what do you know now that leads you to believe that these problems were somehow related to the Harvestore?

A. Well, the heifer reproduction did the same thing. There was a period of maybe six months that it was really poor conception rate on the heifers, during that period when the heifers were cleaning out the silo, but the cows were not. We mixed it with corn silage. I didn't think it was the worst feed, but it was what I had, I guess, at the time and so that's what they got. But then we did haul a lot of it. At the end we just quit feeding it.

Q. You're still talking about 1991?

A. '91, yes.

Q. If we were to work backwards from 1991, had this problem of an occasional early birth or an abortion, had that problem gone on for -- I mean, are we talking five years or ten years or fifteen years?

A. I couldn't pinpoint the year down. It's been a [p. 478] long time. But not as severe as it was in 1991.

Q. Well, was the problem in those preceding years any worse than it had been before you started using the Harvestore?

A. Well, we doubled the herd of size of cows, so I'd expect the problem would double then automatically, I guess, because you've got twice as many cows. I never gave it a thought as to how it was relating before. I could not say if we had more for the number of animals.

Q. So you can't tell me one way or another whether the problem was any better or worse after 1975 than before. Is that fair?



A. I can't remember how many I had before, so its hard to pinpoint as to how many we had later on.

Q. Okay. Are there any other problems relating to breeding or reproduction that you can recall?

A. I'm sure there was some abortions, maybe prenature abortions. In other words, they conceived -- some of these cows would come in heat, and maybe about 40 days later or 60 days later, there they were back in heat begin. And it was just hard to believe we were missing these cows. And so if they were conceived and lost, I have no way of knowing.

Q. When did you begin to have a problem with that?

A. [p. 479] It's been a long time. I guess looking back, maybe at the start of the Harvestore system, yes.

Q. Sometime after 1975?

A. Yes, I would say so.

Q. And what you're describing is a situation where cows that you thought you had inseminated were going into heat the next 21 days later?

A. Well, if they went into heat 21 days later, then I believe they just never took. But, I mean, some of hem that would skip periods and then all of a sudden come in, start all over again, it just seemed like I couldn't explain why they were coming back into heat again at a later date.

Q. Was that a problem that you had ever had before 1975?

A. I don't think it was as noticeable as what we had later on.

Q. What did you do about that problem?

A. What time period are you talking about?

Q. Well, whenever you first noticed this, back in 1975 or when you first began to notice the problem.

A. Well, we really didn't -- you bred them again and, and we had vets come out, do pregnancy, or examine them to see if everything was normal and to explain why they were coming back. I guess this was done [p. 480] when he was doing his pregnancy checking, and he would, some of them had cysts and they were treated and then we went back to breeding them again.

Q. What did your veterinarians tell you, if anything, was the cause of this problem?

A. They never explained as to what was causing it.

Q. Did anyone ever indicate to you that it was related to the quality of the feed that your dairy cows were being fed?

A. No.

Q. Did anyone ever indicate it was related to the Harvestore?

A. No.



Q. Are there any other problems related to breeding or reproduction other than the ones you've just mentioned?

A. No. That would be pretty much all of them.

Q. Do you have a target that you try to achieve with respect to calving intervals?

A. You try and narrow it down. The studies that I've read show that you're more efficient the lower the calving interval you can get.

Q. Do you have a specific target in mind, so many months that you'd like to achieve?

A. Well, I like to achieve down into the 12th month, I

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[p. 500] for itself?

A. It's hard to sit down and say that the silo paid for itself when you take into consideration at the end of the year you've got a hog operation, a grain operation and all these other things. And it's the bottom line is what you go by.

And if it didn't pay for itself, I certainly didn't think it was the Harvestore that was not giving me the return. It could have been because of maybe a bad year of feed or maybe the hog prices were low. I guess at the end of the year every thing was thrown into one kitty, the income from the hogs and that, and I never, ever believed that my Harvestore did not pay for itself.

Q. So is it fair to say that the representation about the silo paying for itself was true?

MR. BIRD: I object to that as improper -- that's not what he said.

BY MR. SHEPARD:

Q. I'm just asking him.

A. I couldn't say yes or no. Like I say, I never sat down and looked to see if -- I guess, like I say, you got to take into all the other considerations. I guess I always felt my Harvestore had paid for

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[p. 502] had you realized the higher profits and more money that Mr. Deutsch had led you to expect?

A. Well, like I said, when you take into consideration the hogs and everything else, it's hard to pinpoint who was making me -- if I had a good year, where it come from. I believe with the, I believe my Harvestore was making me some more money.

Q. Well, would I be correct in saying then that you are not contending that Mr. Deutsch's comments to you about higher profits and more money were false?

MR. BIRD: Well, I'm going to object to that. If you're asking him for legal contentions, that calls for a legal conclusion.

BY MR. SHEPARD:

Q. I'm trying to get a sense from you whether you think those comments that Mr. Deutsch made to you were false.

MR. BIRD: Are you saying now or believed then? That's the point. You're changing tenses now. You were in past tense before, Blake, and now you're coming up present as I understand your question.

BY MR. SHEPARD:

Q. Well, okay. Are you contending now that those [p. 503] remarks about higher profits and more money were false?

A. What I know now? Yes, I would say they were false.

Q. Okay. Well, tell me when you first began to -- tell me what years you failed to receive the higher profits and the additional money that Mr. Deutsch had told you you'd get.

A. That's impossible to answer that, because you've got to have all your records in front of you, and you're talking of all these other enterprises that break down into the final figure at the end of the year. And if the hog markets were low, the drought, bad year or something in the crops -- I never felt that my Harvestore wasn't making enough money.

Q. Okay. I understand that you're saying you didn't realize that at the time. What I'm trying to get a sense of is this: Was there a year, say in 1976, did you realize more profits and more money in 1976 than you had in 1975?

A. I'd have to look at my tax records to show if I realized that there was more profit at the end of the year or not.

Q. And would the same be true for 1977?

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[p. 506] amount of labor that you would have if you had to bale hay. Do you recall that?

A. Yes.

Q. Is that essentially what he told you that you would save labor on, compared to baling hay?

A. Yes.

Q. After using the silo you were able to expand the farm, is that correct? 1977.

A. Yes.

Q. And as I understand it, with the exception of that short period in '77 or '78, you've basically had the same amount of labor that you had before 1975. Is that accurate?

A. Yes.

Q. Well, would it be fair to say that the Harvestore silo has been labor saving compared to baling hay?

MR. BIRD: Again, Counsel, are you talking about his perception now as opposed to what he thought at the

time? I think it's important, Blake. And that's the reason I'd like you to make the distinction in the question.

BY MR. SHEPARD:

Q. Okay. You tell me now, do you think that Mr. Deutsch's comments about the labor-saving advantages of the Harvestore are false?

A. [p. 507] What I know now? Yes, I believe they were false.

Q. And why do you say that?

A. Well, if you look back at all the receipts and everything, all the servicemen that I had to have come out to repair that thing and I paid for that labor. And it takes a lot of help to chop hay compared to baling hay. I mean, I think, yes, I'd say the labor saving has not been -- was false.

Q. And when did you first realize that?

A. This past year.

Q. What did you learn in the last year that led you to that belief?

A. When you lay out all your records and repair bills over the years in front of you and you see all the money that you spent repairing that thing --

Q. Well, I'm not talking about the cost of maintenance; I'm just talking about the amount of time, the labor-saving

efficiency. Do you feel that using the Harvestore was more labor than baling hay?

A. No. It was less labor than baling hay.

Q. So at least that portion of Mr. Deutsch's comment about labor savings was true. Is that fair?

A. Well, when you say labor saving, are you talking man-hours or are you talking costly man-hours?

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[p. 511] that there would be really no records at all that would tell us how much you were feeding?

A. Well, they would not have records. I would imagine in my pile of receipts you could probably come up with some ball park figure, I suppose.

Q. And do you still have your feed receipts that go back to the period before 1975?

A. I believe I handed every feed receipt I ever had in. It's been handed in, I believe.

Q. In to Mr. Bird's office?

A. Yes, I believe so.

Q. But those records would not tell us how much of the protein you bought was being fed to your dairy cows as opposed to your heifers as opposed to your dry cows, is that right?



A. Right.

Q. Now, when I asked you about Mr. Deutsch's representations that the silo would pay for itself in four to five years and that you could achieve higher profits and more money from the use of the Harvestore silo, am I correct that you now believe those statements are false, based on your review of your own records?

A. Yes.

Q. And am I correct that you sat down and looked [p. 512] through some records in the last year or so that led you to believe that those statements were false?

A. Yes.

Q. Okay, what records did you look at in the last year or so that led you to that conclusion?

A. I guess my production records.

Q. Do your production records have information in them that would tell you how much profit and how much money you were making?

A. They don't tell me how much profit I was making, but it tells me that I was not going anywhere over the years.

Q. When you refer to your production records, are you talking about the DHIA records?

A. Yes.

Q. And those records we know were available to you at least as far back as september of 1976, is that right?

MR. BIRD: What do you mean by available to you? You mean for him to review in the last year or so?

MR. SHEPARD: No.

BY MR. SHEPARD:

Q. Do you understand my question?

A. [p. 513] Can you repeat the question again?

Q. You had DHIA records, you were receiving monthly DHIA records all the way back to the time you first began using the Harvestore, is that right?

A. Yes.

Q. So at any given time you could have sat down and looked at the DHIA records to determine what your production was doing.

A. I guess over the time I did sit down and look at my records.

Q. So the records were available to you, even back as far as 1976.

A. Yes.

Q. Now, you mentioned commenting to Mr. Deutsch, I believe in 1990, for the first time you mentioned to him that you were feeding more protein than you thought you should

have to and that maybe your production wasn't what you wanted it to be. I'm paraphrasing. But do you recall telling me about a conversation with Mr. Deutsch in 1990 or 1991 where you expressed some concern about the performance of your milk production and protein?

A. I remember having a conversation with Mr. Deutsch.

Q. Other than that conversation with Mr. Deutsch do you recall any other times when you complained to [p. 514] anyone else about the Harvestore silo or the performance of your dairy herd?

MR. BIRD: That's a double question. I think it's a double question. That's unfair.

BY MR. SHEPARD:

Q. Before that conversation with Mr. Deutsch in 1990, did you complain to anyone else about the Harvestore silo?

MR. BIRD: Are you talking about anybody in the universe?

BY MR. SHEPARD:

Q. Yes.

A. No.

Q. Did you complain to anyone else before that conversation about the performance of your dairy herd?

A. I probably never complained to anybody else but myself.

Q. Did you ever write any letters to anyone, either MVBA or anywhere else, to complain about the Harvestore?

A. No.

Q. Have you ever, before your conversation with Mr. Deutsch, had you ever heard any other Harvestore owners complain about the performance of [p. 515] their Harvestore silo?

A. No.

Q. Before you contacted Mr. Bird had you ever talked to any other lawyers or been contacted by any other lawyers about any possible legal claims involving your Harvestore silo?

A. No.

Q. Did you ever receive any sort of written materials or mailings from an attorney named Ron Schneider?

A. No.

Q. Did you ever speak to Mr. Schneider at all?

A. No.

Q. This is another question that I may have already asked you, and if I did, I apologize. Was there ever a time when you used a free-stall system in your barn, where you didn't have the cows in stanchions?

A. No.

Q. It's been a stanchion barn ever since, as long as you've been on the farm?

A. Yes.

Q. Have there been any changes made to the barn since 1977 other than the -- we've talked a little bit about the change from the milk parlor to a pipeline system. Have there been any other changes

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A. [p. 517] We were in one program, I believe they called it the dairy diversion.

Q. What was the dairy diversion program?

A. The government would pay you -- I don't know how exactly you word it no more, because I know we reduced our production probably by 25 percent. And if we could do that, somehow they calculated they would pay us something. But I don't remember how that all worked out no more.

Q. But basically the government would pay you something for lowering your production by 25 percent?

A. Yeah. It was something like that, yes.

Q. When did you participate in that program?

A. The records would show. I could not remember what year that was.

Q. Was this some sort of program that was intended to keep milk prices up?

A. Well, I guess that and to get the volume of milk off the market, lower the volume.

Q. Who ran the program or administered it? Was that through a county office or a state office?

A. County ASC office.

Q. Was there a local ASC office in Shakopee that you--

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[p. 529] him.

Q. You've talked a little bit already about Dr. Bill Olson's visits to your farm. What was the reason that you contact and Dr. Olson for the first time?

MR. BIRD: You've already covered that, Counsel. That's repetitious.

MR. SCHMITT: No, that's not.

MR. SHEPARD: I think I asked Mary about it. I don't believe I've asked Mr. Klehr about it.

MR. BIRD: Well, go ahead and answer it. I mean, I'm not telling him not to answer it, but my recollection is --

MR. SCHMITT: For him, it's new.



THE WITNESS: Well, the first days after we seen the article in the paper about the Kronebuschs I had a lot of questions I wanted to ask somebody. And I guess over the years the problems I had, I got to the point I didn't trust my feed salesman or my veterinarians, because they didn't seem to solve my problems I was having in the barn.

So I wanted to call somebody that was out of -- I wanted to talk to Mr. Appleman. He was from the University of Minnesota. So I called the [p. 530] university that one morning. This is probably about five days maybe afterward. And Mr. Appleman was away on leave of absence, I guess.

And so they gave me, the lady I was talking to said, "Well what is your problem?" And at this point I was only concerned with my somatic cell and I wanted to talk to somebody. So I think she gave me a veterinarian that was in charge of mastitis controls, this and that. And I talked to him that morning for probably ten minutes on the phone, told him what I had, and I just wanted to know if my somatic cell could be, what could be causing my somatic cell and why am I having these problems.

And he could not help me as far as giving me a direct answer. He didn't know really what it could be. He thought it was the environment, something the cows are laying on. He didn't think it could be haylage. But he asked me if I had talked to Mr. Olson.

I says, "No. I don't know -- who is Mr. Olson?" And he said, "Well, he's a veterinarian." And he says, "I'll give you his number," and he gave me his telephone number and I dialed that number and I talked to Bill Olson [p. 531] for the first time.

BY MR. SHEPARD:

Q. So this person that you talked to at the university the first time you called was, it was somebody other than Dr. Olson?

A. Oh, yeah. The first one, yes.

Q. Do you remember who it was that you talked to?

A. I wrote the name down on my pad the day that I was doing the calling there, but I do not remember who it was.

Q. But it was someone at the university who was apparently an expert in somatic cell counts and mastitis?

A. Well, I got that feeling that he was an expert in that area.

(Off-the-record discussion.)

BY MR. SHEPARD:

Q. Mr. Klehr, so I understand, the person that you talked to at the university the first time was someone that at least you understood to be in charge of mastitis or somatic cell count programs or somebody who worked in that area?

A. Well, the secretary, whoever connected me with him, felt that he could probably answer my questions.

Q. And when you -- do you know -- well, strike that. [p. 532] Do you remember whether or not, was it a guy named Dr. Farnsworth? Does that ring a bell with you at all?

A. I have no idea no more what the name was.

Q. When you talked to him what did you -- tell me what you told him.

A. I told him what was going in my herd, that my somatic cell was so high, and that I been tit dipping; and doing all the practices which I felt should reduce this. And I told him about my Surge equipment being replaced. And a couple weeks before we had just pulled blood samples, but we hadn't gotten them back yet. And I guess I just didn't know what was causing my problem. I was concerned about my somatic cell, because I could not find the answer.

Q. Do you remember what your somatic cell count was at that time?

A. It had to be in the nine hundreds, I believe. 900,000.

Q. How long had the somatic cell counts been high before you made the call?

MR. BIRD: No. Now, you have covered this, Blake. At some, you know, it was painful the number of times you've covered this.

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[p. 534] read in the newspaper about this other Harvestore case?

A. No, I don't believe we talked about that as much as I said, "Could haylage be doing this?"

Q. And what did he say?

A. He didn't think so. He didn't think so. He said that mastitis usually comes from cows laying in dirt or milking equipment or -- but he wasn't certain. He did not pinpoint it down; he just didn't think it could be the haylage.

Q. And was it at that point that he told you, he gave you Dr. Olson's telephone number?

A. Yes.

Q. Now, at this point in time, was this before you had contacted an attorney?

A. Yes.

Q. And so I can pinpoint it in time, it was sometime shortly after you had read the article in the Minneapolis paper about this other Harvestore lawsuit.

A. Yes.

Q. When you talked to Dr. Olson --first of all, when you heard his name, had you ever met Dr. Olson before?

A. No.

Q. [p. 535] Had you ever heard his name before?

A. No.

Q. Did you know anything at all about him?

A. No.

Q. And I believe I'll have to go back to my notes so I don't offend your attorney and I don't want to repeat any of this, but I believe you indicated he came out, Dr. Olson came out to your farm for the first time sometime around March 19th, if I'm not mistaken, is that correct?

A. That would be very close, yes.

Q. Okay. Before Dr. Olson came out, when you talked to him on the phone for the first time, what did you tell him?

A. We got into the somatic cell, and then I think the conversation led into reproduction problems and my milk production. All of those things.

Q. And what was it you told him about your reproduction and your production?

A. My conception rate was very poor and I was very dissatisfied with it.

Q. And was that something you had seen on the DHIA records?

A. Yes.

Q. Do you recall how long that had been going on?

A. [p. 536] It had been going on for a long time, but I never thought it was the silo that caused it.

Q. When you say a long time can you give me just a ball park of how long it had been going on?

A. Maybe ten years.

Q. And how long had -- strike that. What did you tell him about your milk production?

A. Well, that I thought my milk production should be a lot higher for as hard as I was working with the cows. I expected a lot more production out of my cows.

Q. Do you remember what it was, what your production was at that time?

A. In the 16,000 range.

Q. What did you feel your production should have been at that time?

MR. BIRD: What did he feel at that time his production should have been at that time.

BY MR. SHEPARD:

Q. Yes.

A. Well, I felt I was above average dairyman and I felt that I should have gotten above average production. I should be there, yes.

Q. When you say above average, did you have a figure in mind where you thought you should have been?

A. [p. 537] No, I could not say a figure.

Q. What did Dr. Olson say to you on the phone after you told him this?



A. Well, I explained all the things to him and he said he would be coming out in about a week's time for a farm visit and look at the feed.

Q. And I believe we've talked about those visits already.

A. Yes.

Q. When Dr. Olson came out, I understand he took some feed samples, is that correct?

A. Yes.

Q. Do you recall how many feed samples he took?

A. I believe he took one of everything, the high-moisture corn, the haylage and the corn silage, baled hay.

Q. Do you recall what the results of any of those other feed tests were from the samples he took?

A. Well, I'm certain he showed me, but I could not recall what they showed, what they were no more.

Q. What do you recall him telling you about the results of the feed tests he took from the Harvestore haylage unit?

A. It confirmed what we'd been getting all these years, that we had this heat damage. There is a [p. 538] low percentage of heat damage on it.

MR. SHEPARD: Can you read that answer back?

(Answer read.)

BY MR. SHEPARD:

Q. What did Dr. Olson tell you about heat damage?

MR. BIRD: That assumes that he told him anything about heat damage.

THE WITNESS: I couldn't recall if he did tell me.

BY MR. SHEPARD:

Q. Well, you had been having your feed tested on a regular basis up until that time, hadn't you?

A. Well, I wouldn't say on a regular basis, but maybe twice a year we had it done.

Q. So until then -- was it Mark, is it Koepp?

A. Yes.

Q. Was he the person who was testing your feed?

A. Well, there was other feed salesmen or feed store dealers that did it when I was buying their feed. Before, before Mark Koepp, yes.

Q. Over the last six years Mark Koepp had been the one who had made the decision when to test your feed?

A. Well, I don't know if he made the -- we usually tested it in the summer and then in the fall when [p. 539] the corn silage, when all the new crops, or all the crops were in, then we'd test it again.

Q. Had Mark Koepp ever indicated to you that there was, that you had heat damage in the feed?

A. It was brought up that there was some heat damage to it, yes.

Q. Who brought that up?

A. Mark Koepp. He would explain the whole, he'd go over the whole printout that we got back on it.

Q. What did Mark Koepp tell you about heat damage in the feed?

A. He didn't say anything. He just -- to me, I had the feeling that he wasn't concerned about that thing. He was out to sell me more feed.

Q. Well, when you say he told you about heat damage, what was it that he said?

MR. BIRD: I don't think he said he told him about heat damage. He said there was heat damage.

THE WITNESS: Yeah.

BY MR. SHEPARD:

Q. Well, were you able to tell that from looking at the test yourself or would Mr. Koepp explain to you what the results of the test showed?

A. No. The figure would be right there. It said heat [p. 540] damage and a certain percent.

Q. And how long -- well, strike that. Had you had conversations about heat damage with Mr. Koepp during the entire time he was working for you?

MR. BIRD: I'm going to object to that. I don't think you've established that he had conversations with him about heat damage.

THE WITNESS I don't understand the question.

BY MR. SHEPARD:

Q. All right. Let me see if I can get a couple things straight. I'm sorry if I'm not getting this straight. Did you and Mr. Koepp ever have any discussions about heat damage?

A. We talked about it, but it was not a subject that we stayed on because --

Q. Okay. Well, when you talked about it, what did you talk about?

A. It was something that was -- he reported that there was heat damage, but went on to the next thing, because -- he just reported what the analysis would come, back, and as far as where the heat damage come from or if it was unusual or anything, he never mentioned. So I just took for granted that that's standard and that's the standard thing. I wasn't [p. 541] concerned about the three percent heat damage, because I didn't know how severe that was causing me.

Q. Well, when he discussed heat damage with you what was your understanding of what heat damage was?

A. Fermentation.

Q. What was your understanding of how it was caused?

A. I had no idea. I just thought that was a standard fermentation.

Q. Well, when he said heat damage, did that concern you at all?

A. It didn't seem to concern him, so I guess I don't believe I was concerned about it neither.

Q. Do you remember whether or not any of the other feed salesmen that you worked with before Mr. Koepp had ever mentioned heat damage with you?

A. No. I'd say not as much as what -- no. I can't remember every conversation with those other guys and heat damage brought up, no.

Q. Do you ever remember seeing any feed tests before you began working with Mr. Koepp that indicated that there was heat damage in the feed?

A. I cannot recall any reports, no.

Q. And am I right that when Dr. Olson came back and told you about the results of the feed tests that [p. 542] he took that they confirmed the results that you had been getting from Mr. Koepp that showed heat damage?

A. Well, it confirmed that there was heat damage, but Mr. Olson got into it a little bit deeper, because all these

years three percent heat damage to me was, that's not much, you know. I just thought that was a natural thing.

But when he started talking about three percent, I don't know how he did it, on a dry matter or was it on a protein thing. I'm not an expert at all on this. But then he threw some bigger figures in, like 30 percent of your feed is damaged here. And, wow, I thought. Really?

Q. Well, was Mr. Koepp present when Dr. Olson told you all these things about --

A. No.

Q. Did Dr. Olson ever meet with Mr. Koepp?

A. No.

Q. Is Mr. Koepp still working with you?

A. Yes.

Q. Have you told him what Dr. Olson reported to you about the heat damage in the feed?

A. I believe the issue has been talked about as far as the analysis coming back. I do not believe I told

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[p. 591] Harvestore farmers around your geographic area?

A. At what time are you talking about?

Q. At any time.



A. Within the last few months I had heard of some other farmer that had filed a lawsuit.

Q. How about before you filed your lawsuit --

A. No.

Q. -- had you heard of any lawsuits brought by farmers in your area against Harvestore?

A. No.

Q. Before you read about the Kronebusch case in the newspaper had you heard of any other lawsuits against Harvestore other than Mr. Dubbie's lawsuit?

A. No other case.

Q. You were here last week when your wife was deposed. And do you recall her testifying about some financial problems that you and your wife had in the early 1980s?

A. Yes.

Q. Do you recall yourself that there were some financial problems around that time period?

A. Yes.

Q. Can you tell me what the nature of the problems were that you were experiencing around that time?

A. [p. 592] Milk checks weren't big enough.

Q. At that time were you having problems making your loan payments?

A. I believe there was some years that we had some problems making.

Q. Do you recall what loans you had at that time that you were having some problems with?

A. We had one year, with Prudential, the real estate loan.

MR. BIRD: Well, that's it. You've answered his question.

BY MR. SHEPARD:

Q. Well, is that the only problem you recall or were there other loans where you were having problems making the payments?

MR. BIRD: At what time? In the early '80s?

BY MR. SHEPARD:

Q. In the early 1980s.

MR. BIRD: If you can recall.

THE WITNESS: I cannot recall.

BY MR. SHEPARD:

Q. Is it your -- well, strike that. Was it your belief at that time that the problems you were having with the loan was because your milk checks

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[p. 603] when you did that?

A. Yes.

Q. One in, I think it was 1987 or 1988?

A. I believe it was '88.

Q. And then a second time in 1990?

A. Yes.

Q. Other than those changes, do you recall any other management changes that you made?

A. No.

Q. Do you have any records that would show exactly when it was that you went to the milking parlor as opposed to milking in the stanchions?

A. No. There was no records kept on that.

MR. BIRD: Are you going to move to a new area, Blake?

MR. SHEPARD: Yeah.

MR. BIRD: Why don't we take a break.

(Brief recess.)

BY MR. SHEPARD:

Q. Mr. Klehr, let me go back and ask one more question about the period from December of '87 through December of 1990. During this time did you consult with anyone about your decline in milk production during that time period?

A. No.

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[p. 606] THE WITNESS: Well, I guess it's page two, yeah.

MR. BIRD: Well, it says right down here.

THE WITNESS: Oh, yeah. Page two. Basically the whole thing, how they engineered that first Harvestore.

BY MR. SHEPARD:

Q. And why was that important to you?

A. Well, that many years ago, I believed that a lot of study and a lot of engineering costs went into it, and coming from A.O. Smith Corporation I believed that it was well-engineered.

Q. Is there anything else in Exhibit 15 that you recall reading that was important to your decision to buy the Harvestore?

A. Then you get to page five. The breather bag system.

Q. Why was that important to you?

A. Because I definitely wanted to, with the experience I had over the years of air coming in contact with my feed, I wanted something that would keep the air away from the feed and give me the good quality feed that I wanted for my cows.

Q. Is there anything else in Exhibit 15 that was [p. 607] important to you?

A. Well, they talk about the partnership here, that --

Q. What page are you looking at, for the record?

A. Page eight. My dealer or my service people from MVBA would be my partner in making this thing operate.

Q. And why was that important to you?

A. Well, it's like buying any piece of farm equipment; it's the service after the sale that means a lot.

Q. Is there in anything else in Exhibit 15?

A. No, that would be all.

Q. Showing you what's been marked as Deposition Exhibit 16, and for the record, Exhibit 16 is Research Report on -- I believe it's haylage; it doesn't show up on the document -- A Complete Short Course In Print. Do you recall seeing that document before?

A. Yes.

Q. When do you remember first seeing that document?

A. This was after I had purchased my silo.

Q. Do you recall when it was that you first saw that?

A. It was the earlier years. I couldn't say what year for certain.

Q. Do you remember how you got that document?

A. I believe it was sent to me.

Q. [p. 608] Sent to you in the mail?

A. Yes.

Q. Do you recall who sent it to you?

A. I believe A.O. Smith sent it to me.

Q. And why do you say that?

A. Being that A.O. Smith was the company that was making the silos, that they were sending me the information that I was getting.

Q. Do you have a specific recollection of A.O. Smith having mailed that to you?

A. I would definitely believe that that's where it come from, yes.



MR. SHEPARD: I guess I want to object to the answer as being nonresponsive.

BY MR. SHEPARD:

Q. Let me ask the question again. Do you have a specific recollection of receiving that in the mail from A.O. Smith?

MR. BIRD: Objection. That's been asked and answered.

MR. SHEPARD: It's been asked, but it wasn't answered.

MR. BIRD: Well --

THE WITNESS: A definite recollection?

BY MR. SHEPARD:

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[p. 610] Mr. Klehr has had a chance to review the documents since we started the deposition, with the idea in mind that he would be asked to go through and point out the things that he saw that were important to him.

MR. BIRD: That's correct. Now, when you're using the word important, you're not using it in the sense of relying upon it, because I think you've already asked him about all of the documents. So --

THE WITNESS: On page seven they're talking about putting up haylage, and the advantages of it. It was

sort of like an educational thing. This was something I got after I purchased my silo, but they were educating me as to what chop I should do and the moisture that they wanted it at.

BY MR. SHEPARD:

Q. And why was that information important to you when you read it?

A. Well, it was things that I had already known about putting up feed, but like I say, it was just sort of updating my knowledge, I guess. Keep me on top, make certain that I put up that good feed.

Q. Is there anything else in Exhibit 15 that was [p. 611] important to you when you read it?

A. Well, they got, on page 10, they have what happens to forage inside of an oxygen-limited storage structure; where they say more nutrition, more meat, more milk, more profit per acre from haylage. And "What's the reason? For the answer, let's see what goes on in an oxygen-limited glass-lined structure that produces such results." They're talking about their silo.

And how the fermentation, how fermentation works. On page 11 --

Q. Before you go on to page 11, first of all, let me ask you this: Why was that information important to you?

A. Well, I'm not an engineer and I'm certainly not a chemist, as to how haylage ferments, what makes fermentation and what nutrition, what it all breaks down to.

So like I say, when I read these things it's interesting because it's telling me probably some of the things I did not know about fermentation and how it works and how it converts itself into other things.

Q. Is there anything else in Exhibit 16 that was important to you?

A. Page 11 has got no oxygen, no molds.

Q. [p. 612] And why was that important to you?

A. Well, over the years I had experience with silage put outside on a pile or the top of a silo when you went up there in the spring to start a new silo off. And I knew what molds were and I definitely wanted to stay away from that.

Q. Anything else in Exhibit 16?

A. They did an experiment -- on page 16, they did an experiment with some Holstein cows. And what they're doing is haylage versus baled hay for dairy cows. The cows ate more haylage consumed --

MR. SHERAN: Are you referring to page 16?

THE WITNESS: Yes, 16. Well, 17 there. I'm sure it's 16. No. Page 17. Okay. Page 17. And all these things, all the information they're talking about is assuring me that I still bought the Cadillac of it all. I was happy with my Harvestore. Here they're talking about forage works with dairy cattle from birth on.

BY MR. SHEPARD:

Q. What page are you on now?

A. Nineteen.

Q. And why was that information important to you?

A. Because my young stock was going to get some good [p. 613] feed. Definitely, healthy young stock is going to grow to healthy cows.

Q. Is there anything else in Exhibit 16 that was important to you?

A. Page 23, I'd say the whole page was very interesting. They all talked about the oxygen-limited and how the whole A.O. Smith Corporation started selling Harvestores.

Q. And why was that information important to you?

MR. BIRD: Talking about the A.O. Smith Corporation or the whole page?

BY MR. SHEPARD:

Q. Well, why don't we start with what you just told me about A.O. Smith Corporation.

A. Here it says "A.O. Smith engineer who was responsible for the first Harvestore said, 'If spoilage is a problem, let's build an airtight silo; if handling is a problem, let's use an automated unloader.'"

Q. And why was that important?

A. If the company has been in business for so many years, you just have faith in something like that.

Q. Is there anything else in Exhibit 16 that was important to you?

A. Well, another one is A.O. Smith Corporation was

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A. [p. 616] This story of how the Harvestore started always excites me, because all these little things always seem to grow into big things. Like I say, it was always interesting to read that story how Mr., I can't pronounce it. Heath.

Q. What page are you looking at?

A. Oh, page, says 2-3 there, I don't know. It says 2-3, but it must be page three. No, can't be that neither. Says 2-3.

Q. Okay. And tell me why that was important to you.

A. It just, it's sort of like the start of -- what they're telling you is the start of how the Harvestore became what it was and how it grew into a big company and all the research that they had done with the beer tanks and the glass fused.

Q. Now, did you understand this document, Exhibit 17, to be an owner's manual relating to the silo that your father had bought, the 17 by 40?

A. Yes.

Q. Is there anything else in Exhibit 17 that was important to you when you read it?

A. Well, they talked about the oxygen-free feature created the problem of the expansion and contraction of gas in the silo and how they engineered a breather system that would take care [p. 617] of that problem.

Q. And why was that important to you?

A. Like I say, because of the experience I had with some spoilage now and then, and I was looking for something that would take care of the good feed that I had to put up.

MR. BIRD: What page is that on?

THE WITNESS: It's 2-4. And even on top in the first paragraph they remind you of this oxygen-free storage. "Harvestore developed the first structure that stores crops without the oxidation that causes loss of feed value."

BY MR. SHEPARD:

Q. Anything else in Exhibit 17 that was important to you in your decision to buy the Harvestore?

A. They talk about cutting -- on page, now it's 3-3 they're talking about cutting early, when you just see one alfalfa blossom. And with my experience, the early cutting, save that protein and save some field loss. All those things made sense to me.

Q. Is there anything else in that document that was important to your decision?



A. Then on page 3-9, Here's How to Maintain Oxygen-Free Storage. They tell you the things to do to put up top quality haylage. They showed the [p. 618] Harvestore and the fruit jar, which I always related them as that's how the system works. And they told me make sure you keep the door latch closed.

Q. And why was the comparison to the fruit jar important to you?

A. Because over the years I've seen my mom, and Mary did a lot of canning in her earlier years, but my mom and them, they canned and that was to preserve whatever was in that fruit jar. Kept the air from getting in contact.

Q. When you bought the Harvestore, is that how you understood the Harvestore to work?

A. In a way, because I know the fruit jar doesn't have the breather bags, but I knew that Harvestore had done the engineering to make that breather system work. So basically yes, I would say that the fruit jar was an example of how it worked. And with their engineering and the breather system, I felt confident that they knew what they were doing.

Q. Anything else in Exhibit 17?

A. A lot of the pages are just repeat of the previous pages. They keep talking about the fruit jar and the Harvestore and oxygen-free storage prevents spoilage. They talk about harvesting high-moisture

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[p. 627] was interested in the different sizes that they sold.

Q. Is there anything else about that document that was important to you?

A. Well, they talked about the moon and the sun here, which is important.

Q. What about the moon and the sun?

A. Well, what they're telling you is what the breather bag does when the moon goes up and the sun goes down, and how the breather system works. Air does not come in contact with the feed.

Q. And we've been through similar statements in the advertising. Tell me again why that particular portion was important to you.

A. Well, because of the experience I had with some spoilage in the earlier silos at different times of the year, that I definitely wanted to preserve my feed.

Q. Are you talking about spoilage in the staves and in the pile?

A. Yeah. In the cement stave or on the pile, yes.

Q. Is there anything else about Exhibit 20?

A. No. That would be all.

Q. Showing you what's been marked here as Deposition Exhibit 21, this is a document entitled Seminar In

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Q. [p. 629] When do you remember seeing that document?

A. Sometime before we bought the silo.

Q. Do you remember how you got that document?

A. Boy, it could be any variety of any ways. Probably picked it up at a fair.

Q. Would it be fair to say you don't have any recollection of where you got that?

A. No. No.

Q. What do you recall reading in that document that was important to your decision to buy the Harvestore?

A. Because of the years with spoilage and they're talking here as to what causes spoilage, and I just knew that if I bought the Harvestore silo I would definitely be buying the better of any silo, because this here was not going to let my feed spoil. It was going to keep the air away from contact with my feed.

Q. This document, at least from the print, looks like an older document. Do you have any recollection of how long before you purchased the silo you first saw that?

MR. BIRD: I'm going to object to your characterization of the print. Assumes facts not in evidence. Those are conclusions you're drawing [p. 630] from that

and apparently making part of your question. Go ahead and answer.

THE WITNESS: No, I could not tell you as to what year I read this.

BY MR. SHEPARD:

Q. Showing you what's been marked here as Deposition Exhibit 23, this is a document entitled, A Harvestore Owner Can Make A Profit While His Neighbors Are Losing Their Shirts. Do you recall seeing that document before?

MR. BIRD: It's Exhibit twenty --

MR. SHEPARD: Three.

THE WITNESS: Yes.

BY MR. SHEPARD:

Q. Do you remember when you saw that?

A. We saw this before we bought the silo.

Q. Do you recall how you got that document?

A. Could be one of many ways.

Q. You don't have any recollection?

A. No, I do not. No.

Q. What did you read in that document that was important to your decision to buy the silo in 1974?

A. It was just a very profitable thing to buy a Harvestore, because if you didn't buy a Harvestore

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[p. 632] feed, and how aerobic bacteria, those which thrive in the presence of air, are free to multiply and cause fermentation. And what this was doing is it was assuring me that I still had bought the best silo.

Q. Is there anything else in that document that was important to you?

MR. BIRD: Take your time now.

THE WITNESS: On the front page there is a paragraph there. "There is no better way known to store and preserve crop nutrition for livestock than through the Harvestore oxygen-limiting process. As we discussed in the last installment of Harvestore Basics, the combination of Harvestore's nearly airtight construction with the efficient breather bag system protects feed from oxygen and spoilage which results from oxidation."

It was just reassuring me that I still had bought the best silo.

BY MR. SHEPARD:

Q. All right. Is that it for --

A. Yes.

Q. -- Exhibit 24?

A. Yup.

Q. Showing you what's marked here as Deposition [p. 633] Exhibit 25, this is a document entitled Do You Have A Nose For Good Feed. Do you recall seeing that document before?

A. Yes.

Q. Do you recall when you saw it?

A. I saw this before we purchased our silo.

Q. Do you recall how you got that document?

A. I'd have to say probably picked it up at a fair someplace.

Q. Do you have a specific recollection?

A. No, I don't.

Q. What did you read in that document that was important to your decision to buy the silo in 1974, if anything?

MR. BIRD: Read or see?

THE WITNESS: Well, it was a scratch and sniff thing, and it kind of told me as to what good haylage should smell like.

BY MR. SHEPARD:

Q. Was there anything -- so you're talking about the scratch and sniff portion?



A. Yeah.

Q. Do you recall scratching and sniffing that when you got it?

A. Yes.

Q. [p. 634] And what did it smell like?

A. Well, it smelled like molasses. It had this molasses smell.

Q. Why was that important to your decision to purchase the silo?

A. Well, that the cows would love that smell and they would really attract or eat a lot more of the feed.

Q. Well, now you're talking about what the written part of the document says?

A. No, no. They aren't saying it. But the smell, the molasses smell and the good smelling feed would definitely make feed consumption, entice them to eat more. No, they aren't saying that.

MR. BIRD: What exhibit is that?

THE WITNESS: 25

BY MR. SHEPARD:

Q. So that was what you thought when you smelled the little scratch and sniff box on the ad?

A. Yes.

Q. Is there anything else about that document that was important to your decision to buy the silo?

A. Well, the scratch and sniff, the smelling of the molasses all goes back to this oxygen-limited breather bag. Top filling, bottom unload,

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[p. 639] cost and the advantages of feeding high-moisture feed, high-moisture grain, which is more palatable and the cows would enjoy eating it.

BY MR. SHEPARD:

Q. Were those statements about the high-moisture corn consistent with what your experience had been using the 17 by 40?

A. Yes.

Q. And was the discussion about how to put up good feed consistent with the methods you had been using in putting your feed up?

A. Yes.

Q. And had you found that by following the practices that are described in that document that you were able to put up good feed?

A. Will you repeat that question?

MR. SHEPARD: You want to read it back, please?

(Question read.)

THE WITNESS: Yes.

BY MR. SHEPARD:

Q. Is there anything else in that document that was important to, you?

A. No.

Q. Showing you what's marked here as Klehr Deposition

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Q. [p. 644] Was there something that you recall reading in that document that was important to you at the time that you read it?

A. It was convincing me at the time that I was making a profit with my Harvestore silo.

Q. What is in that document that caused you to think that?

A. That this farmer is telling me that it's not the cost, it was the profit that he's making. It lowers your feed costs, increased production, reduces supplement bills and less labor made the Harvestore system my best investment.

Q. And that convinced you that you were making profits on your farm as well?

A. I was making profits using the Harvestore system, yes.

Q. Is there anything else about that document that was important to you?

A. No.

Q. The last document here, Deposition Exhibit 31, this is a document entitled The Harvestore System, How It Can Help Make Every Livestock Farm More Efficient And More Profitable.

MR. BIRD: Do you have a question about the document?

[p. 645] BY MR. SHEPARD:

Q. Have you seen that document before?

A. Yes, I've seen it before.

Q. Do you recall when you saw it?

A. I'd say after I purchased my Harvestore.

Q. Is there something you read in that document that was important to you at the time that you read it?

A. I believe everything in this magazine was important.

Q. So the entire thing was important to you?

A. Yes.

Q. Okay. What was it about this particular document that was important to you?

MR. BIRD: You just asked him that question. He said the entire thing was important.

THE WITNESS: Yes, I would say definitely the whole thing.

BY MR. SHEPARD:

Q. Well, I apologize. Why was the information in this document important to you?

A. Because it still assured me that, it told me how the Harvestore system worked and removed any doubt that I had that the Harvestore system was working. It convinced me that I still had made a good purchase

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A. I'd say not.

Q. Okay. Tell me what it is about the Harvestore that is beneficial as compared to baling hay, from your experience.

A. Repeat that question?

Q. Based on your experience, and remember I'm asking you to eliminate for the moment the fact that you're critical of the quality of the feed, but what I want you to do

essentially is tell me why a Harvestore, in terms of labor savings, is better than baling hay.

A. But you're pointing it only to Harvestore.

Q. That's right.

A. And I would say the cement stave silo would give me the same effect.

Q. That's fine. But I'm asking about Harvestore. Why was the Harvestore better than baling hay as far as labor savings is concerned?

A. Well, labor saving in baling hay was hard, sweaty work, and I guess chopping haylage was a much easier, it was more mechanical means of putting it up.

Q. Is it less time-consuming?

A. Yes.

Q. And I think you mentioned that, early on in your [p.651] deposition I think you said that you had many other things to do with your time besides spend it baling, or hauling bales of hay around.

A. That's right.

Q. What's the relative time savings between chopping hay and storing it in a Harvestore as compared to baling hay?

MR. BIRD: If you know that.



BY MR. SHERAN:

Q. Well, you've done both.

A. Yes I've done both. You could probably put up chopped hay twice as fast as baled hay.

Q. How about in terms of having to take on additional hired help? Do you need more hired help to bale hay as compared to using a Harvestore?

A. No. I'd say it's about the same amount of manpower.

Q. About the same amount. So essentially what it does is it reduces the amount of physical labor and it frees up your time so that you can spend that time doing other things around the farm. It has that advantage, correct?

A. It has that advantage.

Q. And you've found that to be true of the Harvestore throughout the entire 17 years now that you've [p. 652] owned it.

A. It did help take the workload off of putting up haylage.

Q. I guess the next point that you raised is that you did not want to pile the hay outside, laying it on the ground. And the obvious advantage of the Harvestore is that you would not have to do that, you'd have a place to store it, correct?

A. Yes.

Q. And that of course would be true of any other silo.

A. Yes.

Q. So at least as far as that element of your consideration as to why you wanted to buy ultimately a Harvestore, you've accomplished that, haven't you?

A. I could have accomplished it with any other structure though, too.

Q. And you did accomplish it with the Harvestore that you bought.

A. Yes, I did. Yes.

Q. The third thing that you mentioned was that you were looking to expand the herd. And that is something that you did in fact do. You doubled the size of your herd, correct?

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[p. 664] the picture, is that correct?

A. Yes.

Q. Other than what's contained in this page here, do you have any recollection of Mr. Deutsch ever saying anything about a fruit jar?

A. Yes.

Q. Now, when we went through the various representations that Mr. Deutsch had made, it was our

intention, and I'm sure Mr. Shepard's intention, to get from you everything that had been said by Mr. Deutsch to you about the operation of the unit and what representations he made about it. You never mentioned that one. Tell me about that particular representation.

A. Mr. Deutsch mentioned the fruit jar in our kitchen.

Q. What did he say?

A. That the system, the Harvestore system works like a fruit jar.

Q. I think you mentioned that because of your familiarity with fruit jars, because of your watching your mother can things or watching your wife can things, that you have some familiarity as to what that meant. Is that correct?

A. Yes.

Q. [p. 665] But even by that time you knew that a Harvestore did not work exactly like a fruit jar, just based upon your own experience with the corn unit. True?

A. But the engineers were still working on the structures, and so I figured if there was a problem that we had in the corn unit that I felt that they had solved that problem when it got to the haylage.

Q. Well, this particular piece of literature was one that you said that you thought related to the corn unit.

A. Yeah.

Q. All right. But you knew from your operation of the corn unit that a Harvestore does not work in exactly the same way as that a fruit jar works, because you knew that air got in through the unloader door every time you unloaded the corn unit.

MR. BIRD: He never testified to that. I'm going to object. That's a mischaracterization of his testimony.

BY MR. SHERAN:

Q. Is that true?

A. Repeat that?

Q. [p. 666] You don't admit air into the bottom of the fruit jar, do you?

A. You don't let air in the bottom of a fruit jar? Is that what you're asking me?

Q. Right.

A. If you had a door on the bottom of the fruit jar --

Q. If you had a door on the bottom of the fruit jar, you'd let air in the bottom of the fruit jar. But you don't have a door in the bottom of a fruit jar, do you?

A. Right.

Q. And you don't open the top of the fruit jar up and fill it with some more preserves or whatever it is that you typically keep in a fruit jar and then close it up and hope to

maintain a sealed unit. You don't do that with a fruit jar, do you?

A. If the fruit jar lid is put on tight, you would be preserving it.

Q. If you take the fruit jar cap off, take something out of it, put something more in, you're allowing air into the fruit jar.

A. Yeah. But Harvestore engineers had solved that problem. They had a breather system that took care of the air coming in contact with the feed.

Q. I'm talking about when you open up the Harvestore

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[p. 668] vague. If you understand it --

THE WITNESS: I don't understand the question.

BY MR. SHERAN:

Q. Even when you looked at this Here's How book and you saw the analogy that's made there between the fruit jar and the Harvestore, or whenever Mr. Deutsch made his remarks about a comparison of a Harvestore to a fruit jar, you knew that there was some very distinct differences between a Harvestore and a fruit jar, did you not? They were not the same thing.

A. The book says they were.

Q. Maybe the books says that, but you know from your own experience that that isn't true, correct?

MR. BIRD: Now or then?

BY MR. SHERAN:

Q. Then.

A. Well, at the time I'd say that's how we compared the Harvestore to a fruit jar. They're airtight. Air did not get in contact with it.

Q. Maybe that's how you compared it, but that's not my question. We'll go back to the beginning here. You knew that your corn unit, the corn unit to which this fruit jar is being compared, had an

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[p. 678] when the structure is full, so the bags can be pulled up and out of the way, allowing the full rated capacity of the structure to be used." That information was also significant to you, correct? I'm particularly referring to that portion of it that relates to the pressure relief valve.

A. I always had the understanding that those little things on top of the roof were attached to the bags. I never knew that there it was something that went into the structure. That's my belief. When they talked about relief valves, to me, that was what they were; they went into the bag.

Q. Well, maybe that's true, but that doesn't address my question. You told Mr. Shepard that this entire document



was something that was important and significant to you when you read it. Would I be correct in assuming that that would include the statement that a pressure relief valve operates only during periods of unusual temperature change? That's something that you reviewed and was significant to you, correct?

A. I didn't know there was different type of valves up there. I thought everything on top of that rod went into the bag. When they talk pressure relief valve, I thought that's the thing that goes, just

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[p. 685] again, that it's argumentative. I think he's answered your question several times.

MR. SHERAN: He has not answered the question.

MR. BIRD: He's answered it several times. You're making the assumption that this is based on some sort of his personal expectation.

MR. SHERAN: You bet I am. That's exactly what I'm basing it on.

MR. BIRD: Well, you're making the further assumption that it's his personal expectation at that time from the Harvestore, and that hasn't been established. I mean, he's already -- go ahead and answer.

BY MR. SHERAN:

Q. My question is very simple. If in 1979 you expected to get \$34,000 more in milk production than you actually

got, that amount of money is significant enough that you would have noticed it, true?

A. What I got at the end of the year, the milk checks I got was mine. That's all I got. If there was some missing, how did I know what I was supposed to have?

Q. Well, if you expected going into the year 1979 that

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[p. 688] milk production than you actually got, that dollar amount is significant enough that it would have raised a red flag, would it not? That's something you would have noticed?

MR. BIRD: I'm going to object to that on the grounds that he's answered that several times to the best of his ability, and I'm instructing him not to answer the question.

BY MR. SHERAN:

Q. In the year 1984 Mr. Behr says that you lost milk production in the amount of \$99,421. Do you see that?

A. Yes.

Q. Have you ever in your years of farming ever had a profit of \$99,000 from that farm?

A. We had a profit before I built the Harvestore; put it that way.

Q. Of \$99,000?

A. I'm not talking about dollars. We were small operators then, but we had a profit.

Q. What I'm getting at is this: That \$99,000 is a significant amount of money compared to what your income and your profit was from the farm. True?

A. At the end of the year I had an enterprise of hogs, milk, crops, and who knows whatever else. It was [p. 689] all thrown into one kitty, and I never once thought that it was because of my Harvestore not giving me the profit or not doing what it was supposed to. Could have been the bad hogs or bad weather, bad crops.

Q. If you came up short one year \$99,000, that amount of money is a significant enough amount of money so that it would have caught your attention, wouldn't it?

A. I farmed long enough that you cannot project ahead a whole year what you think you're going to get, because it never comes out that way. You take what the good Lord gives you.

Q. One of the representations that Mr. Deutsch made to you is that the Harvestore unit would be more convenient. Do you think that that was true?

A. Would be more convenient than what?

Q. Let me tell you where I'm heading with this series of questions. I'm going to go through the list of representations that he made. Some of the things I know you feel are false. I'm curious as to whether there are some of the things that he represented to you that you think are true.

And I'll just go through the list and you can tell me which things you think are true and [p. 690] which are false. One of the representations he made was that it was more convenient. Do you think that's true or false?

A. More convenient than baling hay? I'd say it was true.

Q. Even based upon the information that you have now, you still believe that that representation is true.

A. Yes.

Q. He told you that it was easier putting it up in haylage or chopped hay than baled hay. Was that true?

A. That was true.

Q. One of the advantages of the unit that he emphasized, according to your testimony, was the bottom unloading feature and that indeed has proven to be an advantage over, for instance, a top unloading stave silo. Is that true?

A. Repeat the question?

Q. Having a bottom unloading silo is an advantage over having a top unloading silo, right?

A. You asking what I know now or what I know then?

Q. Well, are you contending now that that is not true?

A. There is an advantage to having a bottom unloader,

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[p. 692] question. You can answer if you understand.

BY MR. SHERAN:

Q. Let me ask it this way, Mr. Klehr: You were aware going into the deal that there were certain service costs associated with a bottom unloader that you might not have, that you certainly wouldn't have with baled hay and you might not have with a top unloading system. Is that fair?

A. I never had an unloader in haylage before I bought this one. And the problems that if we had some, and we did, with the old high-moisture corn, I believe that buying this big Goliath unloader with all of the engineering put into it, coming from the old A.O. Smith Company, I believed that any problems would have been solved. And I would have expected very little maintenance on the unloader.

Q. But you did have some amount of maintenance, and every time you had maintenance somebody sent you a bill for it, right?

A. Yes.

Q. And as I understand your testimony, your criticism of that representation is that you spent a lot of money on repairing it, right?

A. Or getting it loose, if it got wedged down or something, repairing it, yes.

Q. [p. 693] And each time you had a repair they would send you a bill contemporaneous with the repair.

A. Yes.

Q. You didn't get a whole stack of bills in 1990, you got those bills over the years.

A. Yes.

Q. So over the years, had you elected to do so, you could have kept abreast as to what the total amount of bills were.

A. I had an idea what the bills were.

Q. You did.

A. Oh, yes.

Q. Okay. As they were going along?

A. Yes.

Q. One of the representations that was made was that you could fill and unload at the same time. That's true, is it not?

A. Yes.

Q. Is there anything about that representation that was false, in your opinion?

A. No.

Q. You mentioned that Mr. Deutsch never had anything good to say about going into the chute. Do you remember saying that?



A. He ran down the people that had conventional [p. 694] silos. The farmers that had to crawl up and down that chute, it was the most miserable thing they ever did on a farm.

Q. The stave silo that you have now, that has a chute --

A. Yes.

Q. -- that you go up and down. That is not a very pleasant task, is it?

A. Corn silage is altogether different than haylage. That's the difference.

Q. But as far as that representation is concerned, and I don't even know if it qualifies as a representation, but it's fair to say that that is not a pleasant task going up and down the chute on a cement stave hay unit.

A. That's true.

Q. And you don't have to do that with the Harvestore.

A. That's right.

Q. So that statement's true.

A. Yes.

Q. You mentioned that there was some representations about healthier cows, and I believe that you testified that you always felt you had healthy cows.

MR. BIRD: I object. I don't think that [p. 695] squares with his testimony.

THE WITNESS: I knew I had some problem with the cows, but I didn't -- when you work with them all the time, you see them all the time and all the time, I guess you get to the point you think this must be healthy.

BY MR. SHERAN:

Q. -- Is it your contention that using Harvestore feed does not result in healthy cows?

A. Are you asking me what I know now or what I knew then?

Q. What you know now. Let's start with that.

A. I believe it's not healthy for cows.

Q. And what factors -- first of all, what factors are you taking into account? What information do you have now upon which you base that?

A. By looking at the condition of my cows since they've been taken off of haylage or Harvestore feed and the health of them. It's day and night difference.

Q. Okay. So a comparison between what cows are like when on haylage to what cows are like when they're off haylage, that's the basis that you are now relying upon in determining in your own mind that the Harvestore does not result in healthier cows. [p. 696] Right?

A. Can you repeat that question again?

Q. I asked you -- you said what are you comparing -- strike that. You asked me -- strike the whole thing. I asked you whether or not you felt that Mr. Deutsch's representation that use of the Harvestore would result in a healthier cow or whatever it is that you said, whether or not you felt that that was false or true. And you asked me now or then, and then we went into what your thinking is now.

You told me, as I understand your testimony, that the reason why you think that that statement is false now is because now you've had an opportunity to compare a herd that is on haylage and a herd that is off haylage. You're able to compare the health of those two herds, correct?

A. Yes.

Q. Okay. And it's because your herd is now off haylage and in your opinion much healthier, as compared to what they were like when they were on haylage, that's the comparative basis that you're relying on in your decision that that statement is false.

A. Yes.

Q. [p. 697] Before 1974 your herd was not on haylage. True?

A. True.

Q. And so in 1974 you had the opportunity to make that comparison also, didn't you?

A. Yes.

Q. You could compare your herd health back in 1969 to 1974 to the herd health between 1974 and 1990 to get another comparison about what herd health is on or off of haylage, right?

A. Right.

Q. You made a representation that it was easier to get out in the field apparently, get out and chop at the early stage. I don't think I wrote it down exactly the way you said it, but do you know what I'm referring to?

A. Putting up haylage early?

Q. The way I wrote it down, and maybe I wrote it down wrong, one of the representations that Mr. Deutsch had made to you was that getting, or it's easier to get out and chop when the hay is at an earlier stage, the alfalfa is at an earlier stage. Did I write that down correctly or did I get that all screwed up?

A. Well, earlier stage in the growth? I mean, I guess you can make hay the same stage. I guess what I'm [p. 698] trying to say is you can start chopping earlier in the day than you can probably --

Q. Oh, okay. So is that a true representation?

A. Oh, yes.

Q. One of the representations that he made was that they would pay for themselves, and that was a combination of milk production and protein savings.

A. Yes.

Q. I guess we've talked about milk production. The way in which a dairy farmer -- you'll have to excuse me, because I've not no farm background, but as I understand your testimony, the way a person in your position, a dairy farmer would go about determining how much milk production he's getting would be to look at his DHIA records. Right?

A. That or compare your milk weights or your number of cows you're milking.

Q. Okay. But all of those things are recorded and those records are available to you throughout this entire period of time.

A. Yes.

Q. The other aspect of the pay-for-themselves representation was the protein savings, right?

A. Yes.

Q. [p. 699] How would a person in your position, a dairy farmer, go about determining how much protein they were or were not giving to their herd?

A. Repeat that again?

Q. Apparently one of the representations that Mr. Deutsch made to you was that you could reduce or eliminate protein supplement. Do you think that that's a true representation or a false representation?

A. Their representation was you could almost, very little or eliminate it. My feed samples that always came back, I always had to feed protein.

Q. Okay. So are you saying that that is a false statement?

A. Yes.

Q. The way a dairy farmer such as yourself determines whether or not it's necessary to feed supplement to the herd is by looking at the feed samples that you regularly get on the feed that you produce, correct?

A. Yes.

Q. And that's a record that's made available to you on a regular basis?

A. Couple times a year, yes.

Q. In 1974, 1975, 1976, throughout this entire period [p. 700] of time, a couple times a year a report was given to you which said to you, Mr. Klehr, you have to add supplement to your feed. Right?

A. Yes.

Q. Each time you got one of those records you were doing something that was contrary to the representation that Mr. Klehr had made to you --

MR. SCHMITT: Deutsch.

BY MR. SHERAN:



Q. Excuse me. That Mr. Deutsch had made to you about being able to eliminate protein supplement, right?

A. Repeat that last part?

Q. Every time you got a report that said to you, Mr. Klehr, you have to add protein supplement to your feed, you were getting a report that was inconsistent with the representation that Mr. Klehr had made to you that you weren't going to have to do that.

MR. BIRD: Deutsch.

BY MR. SHERAN:

Q. Mr. Deutsch. I'm sorry.

A. What I got back from my feed samples I believe was the result of the way I was putting up my haylage, that maybe I was not doing things right there. Not getting it in early enough. Maybe my field stands [p. 701] was not good enough alfalfa. Maybe I needed just to have a little better, cleaner fields or something. I never blamed it onto the feed that came out of that silo.

Q. Maybe you didn't blame it on that, perhaps you thought it was for other reasons. But you had a Harvestore on your farm; you had been told that you were going to be able to eliminate or significantly reduce protein supplement, and that never happened.

A. It never happened. I'd like to take a break.

(Brief recess.)

BY MR. SHERAN:

Q. Another representation that apparently was made was that there would be less spoilage.

A. Yes.

Q. Less spoilage as compared to what?

A. I believe less spoilage compared to a conventional silo.

Q. You now believe that that's not the case, is that correct? You think that's a false statement?

A. What I know now? Yes.

Q. What about the representation that you could mix any crop? That's the final of the list of representations that I understand that you claim

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[p. 709] you read either before or after your purchasing the Harvestore unit?

A. I believe that to be true.

MR. BIRD: Well, you mentioned the dirty task deal as another thing that he said.

BY MR. SHERAN:

Q. That's something that you agree with.

A. Yes.

Q. This lawsuit is not about the dirty task of going up and down the chute.

MR. BIRD: Agreed.

BY MR. SHERAN:

Q. Mr. Deutsch was, in your opinion -- was he, in your opinion, a conscientious salesperson in that he followed up after the sale was made to make sure that everything was going well on your farm?

A. Yes.

Q. And as far as you were concerned, as I understand your testimony, at least as far as your satisfaction with the Harvestore unit is concerned, you were satisfied with it and you believed that you were getting the production that you were supposed to get; you believed that it was sufficiently reducing your protein, as had been represented; you believed that your cows were [p. 710] healthier, or at least if they were not healthier it wasn't because of the, necessarily because of the Harvestore. You believed all of those things up until sometime in 1990, is that right?

A. Yes.

Q. Any when Mr. Deutsch came out to your farm before 1990 you never said to him, Mr. Deutsch, I'm not getting the milk production that you promised, right?

A. Correct.

Q. In fact, you never had any criticism at all about the Harvestore during that period of time.

A. Correct.

Q. And he never had any criticism of you either, did he? Let me correct that. There were times when you mentioned Mr. Deutsch and Mr. Johannes would come out to the farm and they would remind you about too long, too short, too wet, too dry, but I think you told us that that was not in your understanding any sort of criticism about the way you were managing, but merely to remind you that you should be alert to good management. Correct?

A. Yes.

Q. And no one else from MVBA, other than, or in addition to Mr. Deutsch and Mr. Johannes, no one

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[p. 712] MVBA personnel other than what you've now told me about?

MR. BIRD: I guess I'm unclear about the question. Are you talking about any contact at any time about anything or are you limiting it to this criticism area?

BY MR. SHERAN:

Q. I meant to confine the question to whether anyone came out and said, Marv, you're doing something wrong or you're not managing this thing properly. No one ever criticized you that way.

A. No.

Q. Now, I think that you said that it was 1990, in the fall of 1990, that Dick Deutsch came out and you told him at that time that you thought you were using too much protein and he said something to the effect, well, now your hard production is up much higher and you're going to have to use protein. Do you remember that testimony?

A. Yes.

Q. Was that in the fall of 1990?

A. I'd say yes.

Q. When is it that you determined, when you said that to Mr. Deutsch in 1990 when is it that you had determined that you were using more protein than [p. 713] you wanted to be or expected to be using?

A. The question was, it was not just me using more protein; it was the general feelings that I picked up over the years that other farmers were using more protein too. It wasn't just me.

When I asked him, I had said that I, talking to my neighbors and to my DHIA man, I asked them do other farmers feed that much protein, to Harvestore owners or anybody. And they all feed protein. So when I brought that up it was a general as to why other farmers or why everybody is feeding more protein. And he said, "Well, nowadays the production is much higher than it was when you built the silo, so that's why you are feeding more protein."

Q. And you don't mean to limit that to just Harvestore owners. Everybody in the dairy business seemed to be increasing their use of protein supplement. That's what you learned?

A. Yes.

Q. And you learned that from your feed man, is that right?

A. Well, or through the DHIA guys is where I mostly got it from.

Q. And this is the explanation for that, that [p. 714] Mr. Deutsch offered to you.

A. Yes.

Q. And then I think that you said at that same time you made a criticism, or not a criticism, but you said that you were not satisfied with your milk production at that time. And then you said Mr. Deutsch said nothing to you about that, is that correct?

A. That's correct.

Q. What was it about the status of your milk production in the fall of 1990 that was not satisfactory?

A. I felt that at this period in time that I should be much higher than I was.

Q. Where were you at that point in time?

A. Probably in the low 16,000.



Q. And where did you think you should be?

A. Watching my neighbors and everybody else going up and -- I felt I should have been superior to that.

Q. You should have been higher than your neighbors or you should have been superior to where you were at?

A. I guess I felt higher than what my neighbors were.

Q. You felt that you should be higher than what your neighbors were.

A. [p. 715] Neighbors or fellow DHIA farmers.

Q. And how do you keep track of what your neighbors' production is or what the DHIA, if it involved DHIA -- how do you keep track of where they're at?

A. The annual summary that comes out every year at that annual meeting.

Q. So each year you get some sort of a statement that gives you something to compare your level of production with either your neighbors or people that are also involved in DHIA generally, correct?

A. That's correct.

Q. And that is a document that was available to you in 1990. Right?

A. It's available every year.

Q. Going back to 1969 when you started dairy farming.

A. Yes.

Q. So that is a comparison that you could make in 1974, '75, '76, et cetera, correct?

A. Yes.

Q. But Mr. Deutsch didn't say anything to you about that.

A. No, he didn't.

Q. He didn't tell you that there was anything that you should do or that you shouldn't do that would change your production in any way.

A. [p. 716] No.

Q. Now, the next time you saw Mr. Deutsch was, I think you said June 22nd, 1991.

A. Yes.

Q. You're very specific about that date. I'm just curious as to why you remember that date so well.

A. Well, it's gone over in my mind many times, because this was about a couple weeks after we had signed our papers and filed our papers with the attorney, and we didn't know what the procedure for the lawsuit was or what happened.

Q. Mr. Deutsch came out at that time and he was unaware of the fact that you had started a lawsuit.

A. I got that feelings, yes.

MR. BIRD: Well, I think the record will reflect that the lawsuit wasn't started. At least I don't think your clients had been served until the 24th.

BY MR. SHERAN:

Q. But you had gone in to see a lawyer, and you informed Mr. Deutsch at that time that you were going to sue Harvestore and presumably MVBA because you were unhappy with the quality of your feed, right?

A. [p. 717] Yes.

Q. Either before or after you talked about that, was it before or after you talked about that that Mr. Deutsch told you that he thought that you weren't filling it fast enough?

A. The first comment I said to Mr. Deutsch was, "I was wondering how long it would take you to get here once the papers were served." The first comment I said to him was that, so he knew at that point that something was going on.

Q. He gets out of the car and you laid that on him.

A. No. He met my son by the barn first. They were standing there talking about the tractor. Steve was working on the tractor. And when they come walking towards the house -- I was putting my shoes on, this was about 1 o'clock in the afternoon -- and that's the first words I said.

Q. Okay. And then he said somewhere after that point in time that in his opinion you were not filling it fast enough?

A. Yes, that was the comment.

Q. And I think that you testified that he had never said that to you at any time before.

A. No.

Q. That's the last you saw of Mr. Deutsch, correct?

A. [p. 718] Yes.

Q. Stepping back for a moment to the advertising and representations, was there any information that you obtained in any of this advertising after 1974 that you weren't already aware of before 1974?

MR. BIRD: I'm going to object to that as being way overbroad and vague.

THE WITNESS: I would have to say that all the information I received afterwards was more or less just an update as to how everything was going. And basically I think I have read, or heard a lot of those things or seen those things before I bought the silo.

BY MR. SHERAN:

Q. Now, this Jim Dubbie, you mentioned a DHIA tester told you or was in your barn and told you that there was a lawsuit going on at that time?

A. Yes.

Q. So if we wanted to put a point in time as to when you had this conversation, it would be whenever that lawsuit was being tried.

A. Not tried. I think maybe filed. I don't believe the trial was going at that time yet, no. I'm certain not.

Q. Okay. So a lawsuit was going on, but perhaps not a

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[p. 761] all.

(Klehr Deposition Exhibits 39 through 47, inclusive, marked for identification.)

(Brief recess.)

BY MR. SCHMITT:

Q. Before this immediate short break you indicated that your farm tour of Ben Zweber's farm was not the deciding factor. Can you tell me what in 1974 you felt the deciding factor was?

A. I would believe that all the literature, the movies, what my salesman told me were my deciding factors.

Q. Well, what was it about the literature, the movies or the salesman's comments that was the deciding factor?

MR. BIRD: Well, I'm going to object to that as being overbroad. God, we've been at this for five and a half days and if you haven't defined that yet -- I mean, we're going into the whole thing over again, Dave.

MR. SCHMITT: No, Charlie, we're not.

BY MR. SCHMITT:

Q. Was there one factor out of all of the things that you learned from the literature, the movies, the salesman, was there one thing that was more [p. 762] important to you than the others?

A. I'd have to say the oxygen-limited. I believe that was the big deciding factor.

Q. And was there any -- strike that. At what point in time in 1974 did you rule out buying a concrete stave silo and decide to go with the Harvestore silo?

A. At what time? I couldn't tell you exactly what time, at what point I decided.

Q. And is there anything else about the oxygen-limiting factor that was important to you other than what you've testified to over the course of this deposition?

A. A lot of the features that they had said that they would do, convenience.

Q. Let me interrupt you a moment, because I didn't express that clearly apparently. Was there anything else about the oxygen-limiting factor specifically that was important to you other than what you've already said to us in your deposition testimony up to this point?

A. Anything else?

Q. Anything else.



A. Just that I was going to get better feed. That was my deciding factor. I wanted the Harvestore.

\* \* \*

[p. 1]  
STATE OF MINNESOTA DISTRICT COURT  
COUNTY OF SCOTT THIRD JUDICIAL DISTRICT  
CIVIL DIVISION PROPERTY DAMAGE

Marvin Klehr and Mary Klehr,  
Plaintiffs,

vs.

A.O. Smith Harvestore Products, Inc.,  
A.O. Smith Corporation, MVBA Harvestore  
Systems, Minnesota Valley Breeders Co-op,  
Midwest Breeders Co-op, and 21st Century  
Genetics Co-op,

Defendants.

DEPOSITION OF RICHARD DEUTSCH

DECEMBER 14, 1992

\* \* \*

[p. 48]background, go ahead and try.

A. So your question was what?

Q. Well, my question was, based upon your knowledge and understanding as a salesman, are you aware of any significant product changes in the Harvestore structure from whenever you started selling silos up to 1984 or '85, when you stopped selling the silos?

MR. SCHMITT: Reflect my objection, please.

A. I would say no.

Q. The Harvestore silo, how does it work, based upon your knowledge and understanding as a salesman?

MR. SHEPARD: Same objection. I also object, the question is vague.

A. I don't know exactly how to answer that, or what are you getting at specifically when you say how do they work?

Q. Well, the Harvestore silos, as I understand it, you correct me if I'm wrong, but are oxygen limiting silos, are you familiar with that?

A. That's correct.

Q. You believe that, don't you?

A. Yes, I believe that.

Q. You think they're the best silo on the market?

A. Yes, I believe that.

Q. You think they're the Cadillac of silos?

MR. SHEPARD: I'm going to

\* \* \*

[p. 56] MR. BIRD: -- get a court order.

MR. SHERAN: If you are going to continue to interchange phrases like that which you know are central to this litigation, then we're going to terminate the deposition.

MR. BIRD: Why don't we read back the last two questions. And I don't think I used oxygen limiting as part of either of those two questions. You go ahead, read those last two questions and answers back.

(Whereupon, the requested portions of the deposition were read out loud by the court reporter.)

Q. Now, we've had all this discussion now, and the question was read back. Can you answer that question?

A. The breather system was explained to them, yes.

Q. What do you consider to be part of the breather system?

A. Well, the breather bags themselves, and that's about it, I guess.

Q. Is the pressure relief valve part of the breather system --

MR. SHEPARD: I'm going to object for lack of foundation.

Q. -- based upon your knowledge and understanding of that term?

A. They are there, again, for the reason that I told you a little while ago about if there is quite a temperature [p. 57] change in atmospheric pressure.

Q. And what I'm asking you is, when you used the phrase breather system, you said you explained to them the breather system, I was trying to find out what you encompassed within that phrase, breather system, you said the breather bags. Now, was the pressure relief valve part of that breather system that you explained to them?

A. Yes.

Q. All right.

A. Yes.

Q. Did you explain to them about the unloader door and closing the unloader door, is that part of the breather system?

A. No, that's not part of the breather system. But the reason people purchase Harvestore is the understanding that we're trying to keep as much oxygen away from the feed as possible, so I guess it's just kind of good common sense to close the door when you're not unloading or close the filler latch if you are not filling.

Q. Now, if a farmer gets bad feed out of a Harvestore silo, what is your understanding of the reasons why, possible reasons why they would be getting bad feed?

A. There could be different factors. Breather bags might leak, the type of feed put into the structure, the amount of feed put in at any given time, or plain management.

Q. [p. 58] Anything else?

A. Structure could have a leak in it.

Q. Any other reasons?

A. Not that I can think of.

Q. Now, breather bag leaks, is that a repairable problem?

A. Yes.

Q. And the structure leak, is that something that's also repairable, to your knowledge?

A. Yes.

Q. And you talked about management as being a potential cause for bad feed. Were two examples of that the feed that you put in and the amount that you put in, is that part of bad management?

MR. SHEPARD: Let me object, I don't think he used the term bad management, I think that's your term.

Q. Okay. He used the word plain management. I think you were implying if the farmer isn't using the silo correctly then he can get bad feed out, is that what you intended to say?

A. Under certain conditions, that could be possible.

Q. And what are some of those management factors that can adversely affect the quality of the feed?

A. Again, the type of feed he puts in, and probably the



amount of feed he puts in at any given time, if he closes the hatch on top or let's it open for three, four days or [p. 59] a week, and also if he closes the bottom door after he's done unloading.

Q. Now, what did you mean by the type of feed going in?

A. Well, if you put poor quality feed in you get poor quality feed out, I would assume.

Q. Now, when you're talking poor quality, what do you mean by that, low protein feed or --

A. Well, there is occasions where people have, according to the weather conditions, probably there could be a lot of grasses or wheat because for one reason or another they seem to keep growing, when it gets too dry alfalfa struggles. So the comparison of feeds versus alfalfa could make it a poor quality feed. The length of period of time the feed has laid out there sometimes being very long could also affect the type of feed coming out.

Q. How about if it was too wet or too dry?

A. Those are also factors.

Q. Is there such a thing as cutting the feed too late?

A. That's a factor, definitely.

Q. How about improper chop?

A. You know more about this than I do. But this is a factor.

Q. And then you mentioned the amount that you put in at any time. What did you mean by that?

A. Well, if the structure was, say, quite empty, and if a

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Q. [p. 67] Have you ever looked inside a 25-footer to look at the dome?

A. Not that I can recall.

MR. BIRD: Let's take a break.

(Whereupon, a recess was taken.)

Q. Ready to go? I got to go back and hit a few points that I missed. Did you ever review any of the internal research of either A.O. Smith corporation or A.O. Smith Harvestore Products Incorporated in relation to Harvestore silos or unloaders or how they work?

A. No.

Q. You talked about the fact that farmers told you good things about Harvestores, how they were having good results with their Harvestores, do you recall that?

A. Yes.

Q. Did you have people that were not satisfied or were unhappy with the Harvestore silos as well?

A. I think about 99 percent was very positive.

Q. Can you give me the names of some of those that were not happy with their Harvestore silos or feed coming from them?

A. Roland Ryan wasn't at the time, Jim Dubbe, and of course Marvin and Mary Klehr.

Q. Any others that you can think of?

A. Not that I can think of.

\* \* \*

[p. 71] question.

A. I would say that that was part of it, yes.

Q. Would you expect that the farmers would believe the material that they read that you had dropped off at the house, and believe the information contained in the films?

A. If I didn't believe that I would have never given it to them.

Q. You never would intentionally try to misrepresent a product?

A. No, sir.

Q. If you had obtained information that Harvestores, through normal daily unloading, admit significant amounts of air into the dome underneath the feed, would you have informed the farmers of that information?

MR. SCHMITT: Objection, improper hypothetical.

MR. SHEPARD: I'm going to object, it calls for him to speculate. I'm also going to object, the question assumes facts not in evidence.

MR. SHERAN: You're asking him to speculate what he would have done under a scenario?

MR. BIRD: Different set of circumstances.

MR. SHERAN: If something like that occurred, you want to ask him what he did, that's fine.

\* \* \*

MR. BIRD: I'm asking him to answer a [p. 73] significant amounts of air came into a Harvestore silo through the unloader door during normal daily feed-cuts in quantities that were large enough to harm the feed, would you, as part of your business ethics, tell the farmer of that information?

MR. SCHMITT: Same objection.

MR. SHEPARD: Same objections.

A. I don't know how to answer that.

Q. What problem do you have with it, why are you confused?

A. The way I understand the question is if that information was available -- I have no information like that.

Q. I'm asking you to assume that you came upon that information, that's all I'm asking you. I'm asking you a hypothetical question. Assume that you learned that. I'm not asking you to agree that it's true, I'm asking you to

assume that, you learned it, would you feel it necessary to tell the farmer about that?

MR. SCHMITT: Same objection.

A. Yes, if this was true.

Q. Why would you feel it necessary to tell the farmer about that?

MR. SHERAN: Same objection.

MR. SCHMITT: Continuing objection to the question which is based upon an improper predicate and improper hypothetical, calling for speculation on the

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A. [p. 79] I would have to say yes.

Q. Would those be meetings where you would be in attendance?

A. Yes.

Q. Now, what were the sorts of things that were discussed at those meetings?

A. Well, we'd generally have a owner of Harvestores that would be probably the top speaker.

Q. Okay. What would they talk about?

A. The results they had in using their Harvestores.

Q. Their personal experiences?

A. Yes, sir.

Q. Would you have any other types of speakers?

A. Occasionally we did, yes.

Q. People like who, can you give me the names of some of the other speakers?

A. Well, I know Dr. Knodt talked at a couple of them.

Q. Howard Larson?

A. I just can't recall any of the rest. It was different ones.

Q. How about George Marks?

A. Yes.

Q. Lee Kilmer?

A. I can't remember.

Q. Wally Waas? He's from Iowa State at Ames.

A. I don't think that we ever had him for a meeting.

\* \* \*

[p. 95] MR. SHERAN: He's asking you if you ever made that representation.

A. No.

Q. Did you represent that the air coming in through the unloader door during unloading was a very small amount,



and because it would be quickly converted to a harmless gas it would not harm the feed?

A. Probably, yes.

Q. Would that be a true statement, in your opinion?

A. Yes.

Q. And is that based upon your education and training from A.O.S.H.P.I.?

A. Probably. Again, I'd have to say probably that source I would have got from that USDA bulletin that any oxygen to get in contact with feed would use up respiration of the plan and fermentation, be converted to carbon dioxide.

Q. You say that's in that USDA bulletin?

A. Yes.

Q. I just want to make it clear, you know what I'm talking about when I say A.O.S.H.P.I. --

A. Yep.

Q. -- I'm referring to A.O. Smith Harvestore Products Incorporated? Did you represent that any air coming into a Harvestore could only enter because of a repairable problem or due to improper management of the silo?

\* \* \*

Q. [p.97] Why is that?

MR. SHEPARD: Same objection.

MR. SHERAN: I join in those objections. He can answer the question, but now you're talking about a speculative situation.

A. If I didn't in my own mind believe that the Harvestore structure works, I would not be selling Harvestores. And the reason I am selling Harvestore to this day, I've been going at it for 25, 27 years, is because of the results that I have gotten from people that have used Harvestores, they have increased production, increased test, eliminated a lot of work, and told me they wished to God they could have bought them sooner.

MR. BIRD: I move to strike as not responsive.

Q. What I asked you was, if you had learned of the fact, and assuming it's true, that there was an unrepairable design problem with Harvestores and air coming into the silos, would you have told the farmer about that, and you said yes, I would have. Now I'm asking you why would you have done that?

MR. SCHMITT: Same objections.

MR. SHEPARD: Same objections.

A. Because I'm no crook.

Q. What did you understand the relationship to be between A.O. Smith Corporation and A.O. Smith Harvestore Products

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[p. 154] MR. BIRD: Some of those he said he did recollect giving to them, some of those he said he didn't

recollect one way or the other, some he said he didn't. The question goes to those that he recalled.

MR. SHEPARD: I have my objection for the record.

Q. Okay. I think you answered the question?

A. Yes.

Q. With respect to those brochures that we talked about where you indicated that you gave those to the farm customer, would you expect that the customer would consider and believe the information contained in those brochures?

A. Yes.

Q. And did you consider the information in those brochures to be reliable information?

A. Yes.

Q. Do you have a recollection of ever representing to Marv and Mary Klehr that mold would not be a problem in their -- the silo they purchased in 1974?

A. The only thing I might have said about any mold was if -- say for instance you filled that Harvestore half full, in between fillings you will experience a small layer of mold.

Q. And anything more than that they shouldn't experience

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Q. [p. 156] During the years that you went out to the Klehr farm, from 1974 to 1984 or '85 and whenever you stopped working for MVBA, do you recall the Klehrs being happy and satisfied with their Harvestore silo? I'm talking about the haylage unit now.

A. Yes, it appeared that way.

Q. Do you recall that sometime in the late '70s, early '80s, Harvestore came out with a new sealer, 79 Sealer they called it?

A. Yes.

Q. And do you recall that there was a program free of charge to the customers where the dealers would go out and apply the new sealer to the side of the silos then pressure test them?

A. Yes.

Q. Do you know whether or not that was done to the Klehrs' silo?

A. I believe it was.

Q. What was your understanding of the improvement that was made by virtue of the new 79 Sealer?

MR. SHEPARD: I'll object, lack of foundation.

A. Well, I would just think that it was better to know when they were using it.

Q. Do you recall that they were using tape sealer in '74?

A. Yes.

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[p.178] where Marvin Klehr complained to you about some sort of problem with his feed from the Harvestore silo in 1990 or 1991; is that correct?

A. Yes.

Q. And as I understand your testimony, that is the only time you recall Mr. Klehr complaining to you about the Harvestore silo or the feed that was coming out of it; is that correct?

MR. BIRD: I object to that as leading and suggestive.

A. Yes, that's --

Q. Before that visit to the farm in 1990 or 1991, I understand you had been to the Klehr farm on several occasions; is that correct?

MR. BIRD: Object to the form.

A. Quite a few years earlier, yes.

Q. And you had been on the farm going back to how far?

A. Had to be before '80 -- I can't remember exactly when I left MVBA.

Q. You had been on the farm going back to at least 1974; is that correct?

A. Yes.

Q. And before you sold the Harvestore silo to the Klehrs in 1974, had you made periodic visits to the Klehr farm?

A. Yes.

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[p. 180] MR. BIRD: Objection, form, argumentative and leading and suggestive.

A. Yes, I talked to him a few times.

Q. And none of those prior occasions before 1990 did he ever complain to you about problems with quality of the feed in the Harvestore silos; is that right?

MR. BIRD: I'm going to object to that, that misstates his testimony. He said during the time frame before the sealer he had no recollection one way or the other.

Q. Go ahead and answer it.

MR. BIRD: I object to the form of the question.

A. I could not remember, no, I could not remember that he did.

Q. Am I also correct, you had the opportunity to observe the feed in the haylage, 1974 haylage unit on more than one occasion before 1990; is that correct?

A. Yes.



Q. And during any of those visits did you notice anything unusual about the quality of the feed?

A. I don't think so.

Q. Approximately how many farmers would you say you have sold Harvestore silos to over the length of your career at MVBA?

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GEORGE MARX,

[p. 3162] called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MORRIS:

Q. Good morning, Dr. Marx?

A. Good morning.

Q. Dr. Marx, would you identify for the jury where you live: What your address is?

A. Yes, my address is 401 Jefferson Avenue, Crookston, Minnesota.

Q. And, Dr. Marx, are you married and have a family?

A. Yes, I am.

Q. Would you describe for the jury, please, how many children you have and their ages?

A. Yes, I have two children, one's 22 and one's 24. And I've been married to Elizabeth, my wife, for 26 years.

Q. Dr. Marx, you're currently on the faculty of the University

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[p. 3272] operating Harvestore equipment?

A. Well, we utilized the Harvestores, of course, for feed and

feed preservation prior to that time.

Q. The university had, in fact, been involved in some Harvestore research before 1970?

A. I'm not quite sure what you mean by "Harvestore research."

Q. I'm not sure, either. There was an understanding -- an agreement of understanding, or something like that, back in the mid-60's between the research facility at Minnesota and A.O. Smith Harvestore Products, Incorporated?

A. Well, I believe that's right, because we have a number of memorandums of agreements with various types of manufacturers, or people that are working with us.

What it primarily says is that the university has the right to publish whether it's positive or negative, and the regular memorandum of agreements that universities have.

Q. Right. And that was back in the 60's. I don't know if you had any -- did you have any direct contact with A.O. Smith Harvestore Products back at that time?

A. Well, I came to Crookston in 1954, and so if that's the date you're talking about, yeah, we've had contact with their director of research, for example. I suppose that was the first contact I've had with them.

Q. Okay. And in 1970, you attended or wrote a paper or gave a

• • •

Q. [p. 3275] It was a haylage conference that was at

Winnipeg, Manitoba, Canada, in '74. It's about --

A. Yes, that's correct, I delivered a paper there.

Q. And on the next page, page five, there's one that says, "Management Considerations in Milk Production"; "Management of Reproduction in Dairy Cattle"; "Feeding and Management of Dairy Cattle and Replacement Heifers"; papers presented at the AOSHPI Seminar in the Sun, San Diego, California, February 10th through 13th, 1975; is that correct?

A. Yes, that's correct.

Q. Were there prospective purchasers of Harvestores at that meeting, or any of the other two meetings or three meetings that we've talked about?

A. Most of the people in terms of this dairy management series were dairymen that were there to obtain new information on haylages and high-moisture grains and management of their herd.

Q. So, these were dairymen that were there at these meetings?

A. Yes.

Q. Dairy producers?

A. Dairy producers.

Q. At the seminar in the Sun?

A. Yes.

Q. Okay. Report -- then just below that, there's a report

presented at the Minnesota Harvestore Seminar, Alexandria, [p. 3276] January 3rd and 4th, 1975, and the Wisconsin Harvestore Seminar at Madison on March 11 and 12, 1975. Are they local meetings?

A. Well, I don't know what you mean by "local," but they were --

Q. Were those for Harvestore dealerships?

A. They were also put on for dairymen.

Q. Were they for Harvestore dealerships, put on behalf of Harvestore dealerships?

A. I'm sure the dealerships were involved in this as well as the state.

Q. Were these meetings that dairy farmers and producers came to, whereby the dealership or AOSHPI was attempting or promoting their product, trying to sell Harvestore structures?

A. I don't believe so. This was their annual winter meeting, both in the case of Minnesota and Wisconsin, they were similar meetings, and dairymen attend these.

Q. Was the Seminar in the Sun, was that a meeting for salesmen of Harvestore structures?

A. No, it's a meeting for, primarily, dairymen. There are salesmen there, of course, but it's primarily for the dairymen.

Q. On the next page, sir, there's a -- on page six, it's a 1976, says, "AOSHPI Barley Bulletin," April, 1976. What [p. 3277] was that?

A. That was a bulletin that we put our high-moisture barley research -- some of the research data was in that particular bulletin.

Q. And that bulletin was prepared for AOSHPI to send or to present to prospective purchasers of Harvestore products?

A. Well, it was research that we did that was put in their particular newsletter or their bulletin. They call it a bulletin.

Q. So, that wasn't contained in one of the promotional literatures that A.O. Smith Harvestore Products produced?

A. Well, I don't believe that it would be called a promotional item. It's their bulletin or their newsletter. It's full of other information that's been developed or that's been researched from not only Crookston at the University of Minnesota but from other universities.

Q. Okay. Your material has been -- your writings have been used in promotional materials produced by A.O. Smith Harvestore Products, Incorporated; is that correct?

A. Well, they've been used in some of their materials. I don't know if you'd call it promotional materials.

Q. I noticed in one of the documents that the Kronebusches got, this says, "Research Report on Haylage, A Complete Short Course" - this article right here - now, this is a promotional bulletin and literature; isn't it, sir?

A. [p. 3278] I would call that primarily an educational bulletin. In fact, it's fairly good. It has a lot of research information from many, many universities and other professors, along with my article.

Q. Yes, sir. And it also has some promotional materials in it,



doesn't it?

A. Well, I'd have to look at that to see what you're talking about in terms of promotion.

Q. Okay. But in any event, of course, you have an article in it, and that's your picture there.

A. Yes.

Q. The document that you put in earlier -- now, this bulletin here was put out in 1975; is that correct? I mean, that's the copyright date.

A. Yes, that's correct.

Q. And the exhibit that you put in earlier, in your direct testimony, it's out of a magazine dated April of 1990; isn't that correct?

A. Yes, that's right.

Q. Progressive Dairyman, 1990?

A. Right.

Q. But in fact, the material that's contained in the 1975 haylage brochure is the same research that is again reprinted here in 1990 in this magazine.

Yes. Effectively, it's the same research. It's a little

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[p. 3282] standing there in front of the Harvestore structures and -- no, you were sitting at a desk, excuse me.

You knew that it was going to be used for the purposes of promoting the Harvestore structures; did you not?

A. Well, I knew they were going to use it for educational purposes.

Q. In the document that you --

THE COURT: Excuse me, Counsel. Now I'm about five minutes to break.

MR. VICK: Yes, sir.

Q. (By Mr. Vick) I forgot one thing, Dr. Marx. You did also -- for A.O. Smith Harvestore Products, Incorporated, you did condense literature for them; is that right?

Q. Yes, I have done some of that.

A. One of the things -- you've been in contact, let's say, with A.O. Smith Harvestore Products, Incorporated, since 1970, doing various things, some of which has been testifying or serving as an expert witness on their behalf since the early 80's, but you never have reviewed any of the A.O. Smith Harvestore Products, Incorporated, internal research and development, have you, sir?

A. I haven't. I don't have access to that.

Q. You don't have access to it?

A. No.

Q. [p. 3283] You never have reviewed any of A.O. Smith Corporation's internal research and development documents?

A. Not their internal documents.

Q. Their R and D, where they've done testing on the Harvestore structures?

A. That's not my line of work in terms of reviewing engineering, or whatever you're talking about.

Q. Talking about where they've done engineering and tested the feeds, and just tested the performance of their structure, and tested some -- some test animal performance of their structures. You never have reviewed any of those things, have you, sir?

A. No, I haven't.

Q. And you never have reviewed the internal memoranda that may go back and forth between people that work for A.O. Smith Harvestore Products, Incorporated?

A. No, I haven't. That's really not my area to review.

Q. Certainly they would know more about the way that a Harvestore performs than you do; is that correct, sir?

A. Well, I assume they do. They worked with -- or had been working with it for many years.

Q. And they would be more aware of complaints that may have been made about their product, about how it performs, than you would; is that correct?

A. Oh, I don't know if they get complaints or not. I have no

\* \* \*

## WILLIAM JOHNSON

[p. 2153] Walvcord was hired as the full-time manager at that time, and in answer to your question, he had no better luck than I did. In fact, not as good, frankly.

Q. What did you do after you got out of the Jamieson Ranch, then?

A. Almost coincidental with our decision to shut down, Paul Conrad's father, who was his partner in Conrad Sales Storage, became seriously ill, had to -- went back to Indiana, very shortly after died, but Harvestore had a rule that there had to be two or more parties in a dealership, Paul invited me and another Harvestore operator by the name of Hettrick -- L.A. Hettrick to come into the dealership with him, and just about the end of '63, early '64, we agreed to do that.

Q. So, you became a Harvestore dealer?

A. Yes.

Q. If you had bad luck with your Harvestores, why did you ever become a Harvestore dealer?

A. That's a good question and one that I think every man that owns a Harvestore has to face some day. You buy these things with great hope, great expectations, you are buying the Cadillac, and when it doesn't function properly, you blame yourself because you can't manage it.

You have to go through quite a process to get from the stage where you worship these things until you look at [p.

2154] them critically and start taking them apart and analyzing their faults, and still, at this period that I joined Conrad, I blamed myself as a manager rather than the structures. Couldn't conceive of these big, beautiful, expensive structures having fault.

Q. At the time that you became a Harvestore dealer, did you still believe in Harvestore?

A. Say again, please.

Q. Did you still believe in Harvestore?

A. Oh, yes, very definitely. Very much so.

Q. Now, did you get any sort of training from Harvestore with respect to Harvestore sales?

A. I didn't go through the normal training sales procedure because I'd had four years exposure to it, plus a dealer who was very moxie and had transferred his information to me. I'd read all the literature. I believe I got more out of what they call the dealer council meetings, which was an annual meeting of all the dealers in the United States where -- where an organized program is presented, and you learned a lot from dealers' firsthand experience and informal meetings. You just learned a great deal from exchanging experience with other dealers.

Q. Where was the dealership when you first joined this dealership? What area did it cover?

\* \* \*

A. [p. 2167] Correct.

Q. When you went into the room, did you have a presentation that you were wanting to give?

A. Yes, we did.

Q. What was the presentation and how did you organize it?

A. We divided it into three parts. I took the first part on what had happened, what had brought us up to his stage, how we'd make these discoveries, the reaction of the owners in California.

Paul Conrad took the center segment of where we stand now, the problems we're facing today and what we're asking you to do.

Hettrick took the third part of where we thought things were going to go if they didn't respond to this problem.

Q. What was it that Hettrick said about what was going to happen if they didn't respond to the problem?

A. He said if the company didn't get out there and work with us as dealers and with the owners, that there was going to be massive litigation. A lot of owners were just on the brink of filing litigation. If they didn't come out and address the problems, there would be litigation.

Q. What did Mr. Hyde say in response to that?



A Mr. Hyde said, "No little California farmer can whip a big corporation." I'll never forget that as long as I live.

Q. [p. 2168] How did you react to that?

A. I -- frankly, in total shock. I couldn't believe the company would take that attitude. The hell with the farmers in California, let them sue.

Q. Why were you shocked by that statement?

A. It wasn't typical of A.O. Smith or A.O. Smith Harvestore Products. They'd been a customer-oriented, dealer-oriented corporation, always seemed to be wanting to work with people, help them, and this was just a total shock to me that Mr. Hyde wasn't the least concerned. Let them, sue, they can't beat a big corporation.

Q. At some point in time, was there discussion about sending someone out?

A. Well, we persisted. We kept begging them to address the problem. We would work with them, the farmers would work with them if they'd come out and make a concrete effort to correct the situation.

So, finally Art Hyde turned to Howard Johnson, the engineer, and said, "Howard, grab your hat, pack your bag, get out there to California and find out what's wrong."

Q. And what did Howard Johnson say in response to that?

A. Howard turned to him and he said, "Art, I don't have to go to California to find out what's wrong. I know what's wrong, and you would know what's wrong if you read the bulletins I put on your desk."

\* \* \*

[p. 2170] situation by making personal appeals to either A.O. Smith or AOSHPI?

A. We did a couple of things. We wrote a certified letter to every dealer in the United States telling them of our problems, cautioning them that every structure they sold was a potential liability, and asking them to join us in cleaning up this mess. We visited -- made a tour through the country and visited every dealer that we could find that would talk to us. We went to Milwaukee and arranged a meeting with Ted Smith, the president of A.O. Smith Corporation.

Q. All right. Let's talk about that. Ted Smith at the time was what? What was his position?

A. He was President of A.O. Smith.

Q. A.O. Smith Corporation.

A. Right.

Q. So, now we're not dealing with AOSHPI anymore, you're going to the big company in Milwaukee?

A. Correct.

Q. And what did you do to try to arrange this meeting?

A. We made phone calls, wrote letters, and we were just persistent. We finally showed up on the front door and he did allow us in.

Q. Did you have a meeting?

\* \* \*

A. [p. 2172] It would have been late spring -- as close as I can come, some time late spring of '65. I'm a little fuzzy on that date.

Q. What was the tone of that meeting?

A. Well, our presentation was, we don't understand why AOSHPI is acting the way they are.

Q. Who's Art again now; Art who?

A. Art Hyde. We were concerned that the hirelings down there weren't telling the parent company what was going on. Their action was so atypical we thought they were hiding this thing and sweeping it under the carpet.

We wanted to make sure Ted Smith and the company was aware of the problem. We thought we might get a more favorable response from our past experience with Ted Smith and A.O. Smith Corporation. They both had superb reputations, and had been very supportive of the whole Harvestore program, and we couldn't understand why all of a sudden they'd taken this negative attitude.

Q. And -- what was the result of the meeting?

A. Well, he assured us that he had been kept informed. He appreciated our bringing this information firsthand to him. He made us no assurances that anything different was going to be done that had.

He just acknowledged that he was informed, had been kept informed, and, frankly, nothing was gained other

\* \* \*

Q. [p. 2174] the conversation?

A. In the men's rest room during the morning break during depositions.

Q. What did he say to you?

A. He said, "Do you fellas understand that if you do prevail, that we can appeal this thing and drag it out for years and years and years? Are you prepared to wait?"

Q. Was Mr. Conrad -- who was in the rest room with you?

A. Hettrick and Conrad and I, and Mr. O'Neil, and Doc answered him right straight off the shoulder. He said, "If we go down the road with the mattress on top of the car, Ted Smith is going to go down the road with a mattress on top of the car."

Q. And did the attorney say?

A. He said, "How do you propose to do that?" and Doc said, "If they're going to break us, we're going to break them, it's that simple. There's no justice involved here, it's who's got the biggest club, and if you're going to break us, we're going to break you."

Q. And did you do anything in response to that, then?

A. The following week, Hettrick and I started out on a trip through Southern California and Arizona. Paul Conrad was unable to come, he was going back to his father's funeral, but Hettrick and I started down through Southern California, talked with the dealers, every owner that we [p. 2175] could locate.

Q. What were you trying to do?

A. We were trying to solicit some support. We thought the more people we could get involved in this, the better idea they'd have of how serious it was. And in a very short time, lawsuits started pouring in at a great rate from people we had talked to down there in Southern California and Arizona.

Q. What did A.O. Smith and AOSHPI do in response to your going down and telling other farmers what the problem was?

A. They got an injunction against us in a court in Arizona, enjoined us from talking to owners or prospective customers, or making derogatory remarks about A. O. Smith or A.O. Smith Harvestore Products.

Q. Did you ever go to a court hearing where that injunction was discussed?

A. I don't know how they obtained it or anything. It was handed to me by my counsel, and I know nothing about the proceedings that led to it.

Q. Do you know if it was an injunction, temporary injunction, permanent injunction or temporary restraining order?

A. I do not know.

Q. Do you know what the specific terms of it were?

A. Well, specifically, our counsel told us, cease and desist from talking to Harvestore owners and dealers, or

\* \* \*

A. [p. 2225] But, they just reported the good part and buried the last, and that's why I remain to this day highly skeptical of university reports. I don't know how often this happens but I know firsthand of one case that I spent a ton of money on where I was hurt by their burying information, and that's why I'm so antagonistic, I guess, about certain academicians.

Q. Now, Mr. Morris also asked you about the fact that you might have bitter feelings towards Harvestore. When you found out that there was a problem with Harvestores, did you continue to sell Harvestores?

A. No. When we -- when we saw the light, we just flat stopped selling.



Q. When you found out there was a problem with the Harvestores in the 60's, what did you do about trying to tell other farmers about the problems with Harvestores?

A. As I say, the grapevine was pretty well informed that there were problems, but we made sure that they did understand that there was a problem, that we were pursuing it with the company, and trying to get them to come out and help us rectify the problems.

Q. When Harvestore found out there was a problem in the 60's, what did they do about continuing to sell Harvestores?

A. Well, obviously they continued to sell them, and my impression was, they buried their head in the sand as to [p. 2226] our problems in California.

Q. The only place they stopped selling was the State of California?

A. To the best of my knowledge.

Q. What did they do, that is, Harvestore, about informing farmers in other parts of the country about the problems that had been experienced in California?

A. They sure didn't inform them.

Q. Well, you got an injunction.

A. We were told to stop -- we -- yes, we were enjoined about telling other farmers about it.

MR. BIRD: That's all I have.

THE COURT: Anything further, Counsel?

MR. MORRIS: Yes, sir.

RECROSS EXAMINATION BY MR. MORRIS:

Q. Just so we get the record absolutely, completely straight, this isn't the first time you've been asked to testify, is it?

A. I have been called before. Nothing has come of it.

Q. You haven't been, for one reason or another, put on the stand?

A. I have never been on the stand.

Q. I also wrote down that when I asked you the question about whether that was a Midwestern university, you told me South Dakota, and in response to the questions by Mr. Bird, you

\* \* \*

### AWARENESS OF CONDITIONS

1. High moisture grain will not keep in Harvestore in Calif.
2. High moisture grain will not unload from a Harvestore with a sweep arm auger.
3. Forages deteriorate in partially filled Harvestore structures.
4. Damaging temperature build-ups occur within feeds stored in Harvestores.
5. Alfalfa stored as haylage in Harvestores does not give satisfactory results.
6. California feeding results do not support performance as represented by AOSHPI.
7. Failure in operational performance has created a hostile attitude in banking institutions and has resulted in withdrawals of normal credit extension to Harvestore owner.
8. Legal action is pending due to substantial extensive financial damage resulting from product failure.

\* \* \*

### RECOMMENDATIONS

1. Adapt structure to assure sealed storage.
  2. Replace sweep arm augers with chain unloaders in all grain structures.
  3. Develop a reflective surface on the exterior of the Harvestore structure to reduce heat absorption, thereby diminishing temperature variation within the structure.
  4. Develop and document haylage and high moisture grain feeding programs adapted to California conditions.
  5. It is imperative that AOSHPI inform present owners of Harvestores in California of their awareness of the conditions existing in California, and assure these owners of the company's intent to rectify this situation. Such a company policy will also assure dealers sales personnel and their prospects that they can proceed with the installation of Harvestores, knowing the product is backed by the integrity of AOSHPI.
-

[p. 3] WILLIAM WALLACE SMITH, JR.,

called as a witness, being first duly sworn, was examined and deposed as follows:

DIRECT EXAMINATION

BY MR. McCUNE:

Q. Could you state your full name for the record, please?

A. William Wallace Smith, Jr.

Q. And where do you live, Mr. Smith?

A. 1418 West Weathersfield, spelled like it sounds, Way, Schaumburg, Illinois.

Q. How old are you, sir?

A. 48.

Q. Okay. And with whom are you employed?

A. A. O. Smith Harvestore Products, Incorporated.

Q. What is your position with A. O. Harvestore?

A. Vice-president of Product Engineering.

\* \* \*

[p. 20] under a good structure, you would not expect significant amounts. You're talking about a molecule here and there as opposed to something that could be significant.

Q. When you say a molecule, you're not talking in terms of several hundred cubic feet of air a day?

A. No.

Q. Okay. If the seams were all appropriate, then you've got three categories where you're going to expect some sort of gas exchange, that would be during the loading process, and I assume, anytime the farmer looked in to inspect the --

A. That's right.

Q. -- the system. During the unloading process through the unloader door?

A. (Moved head up and down.)

Q. And through the relief valve?

A. Yes.

Q. Correct? Now, are you aware, does A. O. Smith Harvestore products have the ability or capability to predict the amount of air that will be exchanged through the relief valve under given climactic conditions?

A. No.

Q. Does A. O. Smith Harvestore Products Incorporated have the ability to predict the amount of [p. 21] air exchange that will take place through the unloader door during a given set of circumstances regarding the unloader process?

A. No, we do not.



Q. Now, during the loading process, that's done by blowing feed into --

A. Yes.

Q. I assume you can predict how much air will end up in the system under those circumstances pretty well, can't you?

A. Not accurately, no.

Q. Wouldn't you pretty well get a whole silo that will be basically ambient air when you finish that loading process except for the space occupied by silage, obviously?

A. Yes, and there's quite a bit of oxygen gasses within the silage itself, and that has not lent itself to prediction.

Q. Okay. I take it also there is no way A. O. Smith Harvestore Products Incorporated can predict the amount of air that will be exchanged through leaks you find in the average structure on a given dairy farm?

A. Not over a period of time.

Q. Okay.

Q. Now, the term oxygen limiting is used with [p. 22] regard to the Harvestore structures, is it not?

A. That's right.

Q. That term, that description of the Harvestore structure is not based on any study that determines how much oxygen actually gets to be volume, gets to the ensiled mass during any storage period, is it?

A. It's not based on a study on oxygen, an accurate study showing the amount of oxygen that gets to the silage. It's based primarily on studies that have been made, first general logic that by sealing the structure and doing what has been done, that you are limiting the oxygen and, two, the results of the system which have proven time and time again that it is effective.

Q. Well, the answer to the question is that representation is not based upon any study that indicates the amount of oxygen that actually accesses the feed during the process, correct?

A. Far as I know, that is correct.

Q. How, when the air does get in, when oxygen does come in contact with the feed, there are reactions that will take place with the feed that can take place only in the presence of oxygen; is that correct?

A. I understand that's correct. That's

\* \* \*

Q. [p. 52] Is the design of the breather bags -- first of all, is "breather system" a term with which you're familiar as it relates to the Harvestore, for example?

A. We use that term in a general sense.

Q. What does the breather system refer to?

A. The breather bag is a total system.

Q. Does the breather system include the relief valve?

A. Yes.

Q. So, when we're talking about the breather system of the Harvestore structure, we're talking about the breather bags and the relief valve?

A. Yes.

Q. That basically is the breather system, isn't it?

A. Yes.

Q. Now, does, to your knowledge, Harvestore represent that that breather system prevents oxygen from coming in contact with the feed?

A. Of course not.

Q. Okay. If that representation was made, it would be a false representation, I take it, based upon your judgment?

A. Yes.

Q. Who works as a liaison between your

\* \* \*

[p.33]

DONALD DUNAWAY

being present pursuant to the NOTICE and ORDER, having been first duly sworn on oath, testified as follows:

\* \* \*

[p.82] cent owner of AOSHPI, recognizing that at the time of initial incorporation it owned ninety-five percent?

A. I believe it was in late '68 or early '69.

Q. And since that time to the present, as I understand it, A.O. Smith has been a one hundred percent owner of AOSHPI?

A. That's correct.

Q. Now, that brings us back to a point in time where we left off with you at the retail installment credit -- or Time Credit Division.

A. Okay.

Q. How long did you serve in that capacity, sir?

A. From the time I joined Smith until Time Credit was sold and that was -- well, I hope I gave you the same dates --

Q. I'm not going to quibble over it.

A. '65 or '66.

Q. After you left -- after that division was sold what position did you fill?

A. General Credit Manager of Smith.

Q. And the function of General Credit Manager of Smith, at the time you were in that capacity, was what, sir?

A. Um--a staff relationship to Smith's divisions, attempting to assist them in the management of their accounts receivable and credit practices.

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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF OLMSTED THIRD JUDICIAL DISTRICT

Raymond Kronebusch and  
Larry Kronebusch,

Plaintiffs,

ORDER AND MEMORANDUM

-VS-

MVBA Harvestore Systems;  
Minnesota Valley Breeders  
Co-op; A. O. Smith  
Harvestore Products, Inc.;  
A. O. Smith Corporation;  
and Jerry Papenfuss,

Defendants

Post-trial motions in this case were heard March  
29th, 1991. Appearances were:

CHARLES A. BIRD, Esq., of Bird &  
Jacobsen Law Office, 305 Ironwood Square,  
300 Third Avenue Southeast, Rochester,  
Minnesota 55906, appeared as co-counsel on  
behalf of Plaintiffs.

WILLIAM D. MAHLER, Esq., 301  
Ironwood Square, 300 Third Avenue  
Southeast, Rochester, Minnesota 55906,



appeared as co-counsel on behalf of Plaintiffs.

BLAKE SHEPARD, JR., Esq., of Leonard, Street & Deinard Law Office, Suite 2300, 150 South Fifth Street, Minneapolis, Minnesota 55402, appeared as co-counsel on behalf of Defendant A. O. Smith Harvestore Products, Inc. (AOSHPI).

CLAY TILLACK, Esq., of Katten, Muchin & Zavis Law Office, 525 West Monroe Street, Suite 1600, Chicago, Illinois 60606-3693, appeared as co-counsel on behalf of Defendant A. O. Smith Corporation (A. O. Smith).

Upon the memoranda and arguments of counsel, and all of the files and records herein,

IT IS ORDERED:

1. That defendants' motions for amended findings of fact and conclusions of law are denied;
2. That defendants' motion for judgment notwithstanding the jury's verdict is denied;
3. That defendants' alternative motion for new trial is denied;
4. That plaintiffs' motion for pre-judgment interest pursuant to M.S. 549.09 on \$1,200,000 from

commencement of this action to entry of judgment herein is granted;

5. That plaintiffs' are allowed their costs and disbursements herein;

6. That plaintiffs' motion for the allowance of attorney fees and investigation costs pursuant to M.S. 325.67 and M.S. 8.31 is granted, and this Court's order of May 9, 1988, to the extent it is inconsistent with this order, is vacated;

7. That entry of judgement herein shall be deferred an additional 30 days from the date of filing this order to allow plaintiffs time within which to notice hearing on the amount of allowable attorneys fees and investigation costs incurred herein.

A memorandum is attached and made a part of this Order.

Dated this 10th day of June, 1991.

BY THE COURT:

/s/ John S. Gowan  
Hon. John S. Gowan  
Judge of District Court

## MEMORANDUM

On February 15, 1991, a jury of this Court awarded Raymond and Larry Kronebush \$1,200,000 in damages against Defendant A. O. Smith Harvestore Products, Inc. (AOSHPI), and Defendant A. O. Smith Corporation (A.O. Smith). Punitive damages of \$1,250,000 were also assessed against each defendant.

The remaining defendants, Minnesota Valley Breeders Co-op and Jerry Papenfuss, paid plaintiffs \$75,000 after trial commenced in return for plaintiffs' agreement to withdraw their claims against them.

Upon the jury's special verdict, this Court entered Findings of Fact, Conclusions of Law, and Order for Judgment on February 19th, 1991, with the proviso that entry of judgment be stayed, as agreed by the parties, pending resolution of any post-trial motions.

Defendants have moved for amended findings of fact and conclusions of law; for judgment notwithstanding the verdict, or, in the alternative for a new trial. Plaintiffs have moved for pre-judgment interest, and allowance of costs, disbursement, and attorneys fees.

I. Defendants' motion for amended findings and conclusions of law:

Defendants seek set-off of \$75,000 paid by Minnesota Valley Breeders Co-op and Jerry Papenfuss for a release of plaintiffs' claim against them.

Fraud is an intentional tort, the evidence of which, on the part of defendants in this case, is overwhelming. A perpetrator of fraud is separately liable for the consequences of its conduct.

By their settlement plaintiffs made their judgment as to the degree of culpability for the harm done to them by those who paid them. For the co-op and Mr. Papenfuss, the \$75,000 may only be a measure of the amount they were willing to pay to avoid having a jury render judgment upon them.

Defendants should be in no position to benefit from this transaction. It may be said that to deny the set-off plaintiffs benefit in an amount greater than the damages assessed by the jury, but then, had the jury passed upon the conduct of the settling parties, who is to say that the total of the punitive damages would not have been greater. The compensatory damage award to plaintiffs would not have been affected by the presence of the settling defendants, but the parties, in their settlement, made no apportionment between punitive and compensatory damage. Can defendant now require that the total settlement be credited against compensatory damages? No case authority requires this, nor is there any principle to commend it, and therefore defendants' motion will be denied.

II. Defendants' motion for judgment notwithstanding the verdict:

The evidence in this case, taken as a whole, is sufficient to support the jury's findings as set forth in its special verdict.

Defendants refer to acknowledgments by plaintiffs in silo purchase orders (Exhibits 55-60) to the effect that they did not rely upon any representations by defendants in their decision to purchase any of the five silos involved in this litigation as a basis to defeat the jury's finding of reliance. But there was other evidence which supports the jury's finding, including the direct testimony of both Raymond and Larry Kronebusch that, indeed, they did rely upon defendants' representations in their decision to purchase each of the silos. It would not do for this Court to substitute its judgment for the jury on this issue when there is evidence which, if believed by the jury, would support a finding of reliance.

Defendants also cite their statute of limitations defense as to the 1968, 1972 and 1975 silo acquisitions as a basis for this motion. Defendants elicited admissions tending to establish knowledge on plaintiffs' part that its representations respecting the worthiness of its silos as a mechanism for preventing oxygen from coming into contact with stored feed were false and fraudulent. As the jury was instructed, fraud actions must be commenced within six years of discovery of the fraud. Plaintiffs' evidence was they consulted their Harvestore dealer as problems arose and undertook necessary repairs and followed their dealer's recommendations for modification of their use of the silos. Thus, a jury could infer that plaintiffs believed any problems were attributable to mechanical defects or improper usage that could be corrected.

In March 1985 Larry Kronebusch, while inside one of his silos which was undergoing repair, observed the presence of extensive mold covering surface areas which, as

he put it, caused him to suspect something seriously wrong with the silo. He consulted a lawyer and within two months of this discovery filed this lawsuit. From this evidence a jury could find that not until then--March of 1985--did plaintiffs discover evidence sufficient to place a reasonable farmer--one who is unsophisticated in causation factors involving engineering and structural design considerations--on notice of defects in the Harvestore system to the degree necessary to require him to commence legal action in order to preserve his remedies on the theory of fraudulent misrepresentation on the part of defendants.

For the foregoing reasons, defendants JNOV motion is denied.

### III. Defendants' motion, in the alternative, for a new trial:

This Court has reviewed the errors cited by defendants as grounds for a new trial and find them to be without merit. All fall within the ambit of Rules 59.01 (a) and (f) M.R.C.P. and refer to alleged errors in evidentiary rulings and instructions. These will be grouped and treated in the order set forth in defendant's motion.

#### Evidentiary issues:

5(a): The evidence referenced advertising relied upon by the plaintiffs in purchasing the 1972 (Exhibit 69) and 1975 (Exhibit 70) silos. The ads do contain performance representation of Harvestore silos relevance to the issues in the case, and it was for the jury to determine whether plaintiffs had relied upon them.



5(b): The film, "The Harvestore System," was admitted without objection as Exhibit 79. Defendants cite error in the admission of Exhibit 80, a transcript of the film. Defendant made no claim that the transcript was inaccurate. In the Court's view, the transcript was a helpful reference to that which the jury had already seen and heard on the film and would assist in evaluating the film content.

5(c): Harvestore Buyers Guides for 1973 and 1974 (Exhibits 98 & 99) were received by Raymond Kronebusch and were relevant to the issues of representations and reliance. It was for the jury to determine the weight they deserved.

5(d): Internal documents of defendants (Exhibits 115 & 119) were part of a collection introduced by plaintiffs (Exhibits 115-116, 118-120, 122-127, 129, 131, 134-135) tending to show knowledge of defendants of deficiencies in performance and design in the Harvestore System for storing feed. From these, a jury could infer defendants' knowledge spanned a period from 1940-1980 during which they made no significant design changes to accommodate the problems. All of these exhibits were clearly relevant to the case issues, and all were admitted without objection.

Exhibits 143 and 144 were admitted to aid the jury's understanding of comparative studies concerning the Harvestore and Madison silos introduced through the deposition evidence of William Smith, Jr. His testimony was relevant to case issues and the referenced exhibits in understanding his evidence.

Exhibit 145 is evidence of knowledge on the part of defendants of Harvestore deficiencies and was properly admitted for that purpose.

Exhibits 241 and 242 document studies at the Tuxen Farm in Alma, Wisconsin, conducted in 1981 in which AOSHPI personnel participated. These studies were relevant to the extent of defendants' knowledge respecting the factual claims for its product made over the years by defendants dating from the 1960's and from which the jury might infer that even in 1981 defendants still did not know how much air contacts feed within the Harvestore structures.

5(e) and 5(f): Prior litigation involving similar claims against defendants was relevant to show their knowledge of complaints extending over many years and involving farmers in different areas of the country in varying climates, and of defendants' response to these claims -- namely, no significant product design changes, and no significant change in product advertising claims. Indeed, factors to be considered by a jury in evaluating punitive damage claims include "the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the number and level of employees involved in causing or concealing the misconduct . . . ." M.S. 549.20, Subd. 3. In this respect, the testimony of William Johnson, who had extensive experience in the use of Harvestore silos, was particularly relevant, as was his testimony respecting his attempts to alert high officials of both defendants of the magnitude of the problems and the need to address them appropriately. So, too, was his evidence of the response he got from these

company officials. The admitted Exhibits 147, 177, and 168 were all relevant for the same reasons.

5(g): To the extent that the A.O. Smith corporate policy manual (Exhibit 174) afforded the jury a glimpse of its management objectives and practices, if was relevant and helpful in acquainting the jury with defendant and contributed to a frame of reference within which to understand the issues in the case.

5(h) and 5(I): The James Johnson testimony and his memorandum (Exhibit 178) was admitted to show the attitude of A.O. Smith policymakers toward product complaints and the objective of shielding knowledge of product deficiencies from the public, all relevant to issues of fraudulent misrepresentation and punitive damages. The exhibit was not subject to an attorney-client privilege because of its prior publication, and, in the context of the case as a whole, it was evidence of fraud not embraced by the privilege. Further, at the time the memorandum was sent James Johnson was corporate secretary, and, since it was sent to corporate employees, it was reflective of corporate policy and, thus, not privileged.

5(j): The reports and analyses (Exhibits 197-200) were admitted as documentation of Dr. Behr's damage theory to enable the jury to better understand and evaluate his opinions. His computations (Exhibit 247), intended as rebuttal to the factual basis for the opinions of defendants' economic expert, Dr. Dahl, was admitted for the same purpose.

5(k): Counsel for both parties utilized handwritten charts as a medium to establish or confirm proofs elicited from witnesses on both direct and cross-examination. Exhibit 180 is but one example of this. It is representative of many such charts which were admitted for both sides as an aid in the jury's understanding of the evidence. Exhibit 181 is but one example of charts brought to the courtroom by both sides which were admitted for the same purpose.

5(l): Evidence of the potential for an increase in milk production with adoption of the Harvestore system for feed storage was admitted to show product claims relevant to the misrepresentation and reliance issues. Dr. Behr's damage theory did not incorporate this evidence and was not submitted by plaintiffs as part of their damage proofs.

5(m): A.O. Smith reports (Exhibits 203-206) were admitted as evidence of admissions by defendant (Exhibits 203-205) of its product lines and market objectives in agriculture, and its relationship to A.O. Smith Harvestore Products, Inc. This evidence was relevant to the issues of control exercised by A.O. Smith over the operations of its subsidiary, and the degree of its participation in the marketing and sale of Harvestore products. Exhibit 206 was admitted to show the financial condition of A.O. Smith, evidence relevant to the issue of punitive damages.

5(n): Exhibits 207-208 were admitted to show the relationship between A.O. Smith Corporation and A.O. Smith Harvestore Products, Inc., given the identical nature of the content and structure of the ads, but with different logos. The evidence was relevant to the same issues discussed here with referent to 5(m) as to Exhibits 203-205.



5(o): The sales training manual (Exhibit 201) was admitted to show AOSHPI marketing objectives and sales techniques and its relationship and instruction to Harvestore dealers.

5(p): Defendants raised a question respecting whether certain feed tests had been done, and, if so, when. On rebuttal, plaintiffs offered a record of certain feed tests (Exhibits 245-246) to answer these questions, and the evidence was admitted for that purpose.

6(a): The complaint was excluded as an instrument for use in cross-examining Larry Kronebusch because to permit it would be unfair. The Rules of Civil Procedure permit his attorney to prepare it would be unfair. The Rules of Civil Procedure permit his attorney to prepare it and do not require that Kronebusch read or sign it before it is served. Whether a claimant adopts or rejects language of the complaint at any point in time could result in confusion and obfuscation of the issues and the evidence, and provoke embarrassment of a witness, the parties and their attorney, and bring the processes of the law into disrepute. The rules make only the attorney who prepares the instrument responsible for its content, not the plaintiff who was the witness here. The attorney cannot be required to testify as to its content before the jury hearing the case. If that is so, it would be incongruous to require plaintiff to explain its content. This is particularly true here since the complaint involved multiple parties and multiple theories of liability and damages, had been amended, has been the subject of multiple summary judgment motions which resulted in the dismissal of some claims, and, as to those remaining, save one, the rest were dropped. To require plaintiff to answer

for the content of his attorney's work product -- at that point -- would have been ludicrous. Better for the jury to decide the case on the evidence, leaving the pleading to frame the issues. For that reason, the evidence was excluded.

6(b): Dr. Paul Grafenburg was available as a witness to the parties, and his deposition testimony was excluded for that reason.

6(c): Deposition testimony of Jerry Dekan was scheduled and taken after the deadline for discovery established by order of this Court. It was excluded for that reason. Defendants were informed his testimony would be permitted upon his appearance as a witness. His post-trial affidavit, included in the record of these proceedings, discloses he would have been available as a witness had he been called to testify.

6(d): The testimony of Harlan Stehr was excluded upon defendants' showing of their intention to present the witness as a successful Harvestore farmer. The Court determined that the yield from such testimony, while having some probative value, would move the focus of the trial into issues far removed from those at hand, namely, was the witness indeed a successful Harvestore farmer, and, if so, to what was it attributable. Plaintiffs also disclosed the witness had refused, on the advice of his own separate counsel, to disclose financial information deemed pertinent to issues his testimony would raise. Further, through other witnesses and particularly Dr. Marx, defense counsel was permitted to offer a considerable body of evidence that Harvestore silos were in wide usage. Further, the Court rejected plaintiffs'



offer of evidence of prior verdicts in Harvestore cases for the same reasons adopted in excluding the Stehr evidence. Both forms of evidence had some probative value, but both would have introduced matters foreign to the jury's careful consideration of evidence in this case.

6(e): Exhibits 875 and 935-945 were excluded as being without foundation and otherwise hearsay.

6(f): Exhibit 894 was excluded as being without foundation and otherwise hearsay.

#### INSTRUCTIONS:

7(a): Instruction on concurring cause was given because an issue was raised as to whether more than one cause contributed to losses in plaintiffs' dairy farm operation.

7(b): Instruction on intentional torts was given to assist the jury in defining the term since it was an issue in the case.

7(c): The damages instruction was framed to account for theories of damages advanced by both parties in the case and yet embody existing law.

7(d): The indirect representations instruction was given to account for evidence of defendants' multifaceted marketing approach, embracing advertising in multiple mediums and third-party contact.

7(e): The agency instructions were given to account for evidence of the relationship between the parties defendant and the extent of any legal consequences flowing from such relationship.

7(f): The jury verdict form was drafted to reflect the necessary elements required for proof of plaintiffs' fraud claim, and to determine any liability for compensatory and punitive damages. It does this by breaking these elements into component parts with each to be addressed in the appropriate order so that the answer to one question would not forecast the answer to any other.

8(a): The statute of limitation instruction was crafted in plain language to provide a definitive answer to an issue in the case, given the jury instruction to which no objection was made.

8(b): Statements or salesmen from the Harvestore dealer were not singled out for specific instruction because the subject matter was covered by the agency instruction.

8(c): The subject matter concerning expressions of opinion and predictions regarding future events was covered by the instruction on fraud and misrepresentation.

8(d): The subject matter of fraudulent concealment was covered by the Court's instructions.

8(e)-8(i): The subject matter of damages was covered by the Court's instruction.

8(j): The subject matters of fraud and misrepresentation and statute of limitations were included in the special verdict form. Fraudulent concealment was not the subject of a separate claim and was not required for separate inclusion in the special verdict form. Nor were defendants entitled to separate findings in the special verdict form as to each silo. This case did not involve five separate lawsuits, or even separate claims concerning five silos. Instead, it involved a single claim against two defendants stemming from the use of Harvestore silos which allegedly caused damage to a dairy farming operation owned by plaintiffs. The verdict form was crafted to reflect findings necessary to establish or refute that claim.

9: The "material respects" in which the video tape system used in recording these proceedings were inadequate have not been defined by defendants, and thus this Court rejects this as a proper ground for assignment of error in these proceedings.

#### IV. Plaintiffs' motion for pre-judgment interest:

Plaintiffs rely upon M.S. 549.09. The reach of the statute is to both pre-verdict interest on pecuniary damages, and post-verdict interest until judgment is finally entered.

As to pre-verdict interest, the issue is whether there was a proper written settlement demand as contemplated by the statute. If not, pre-verdict interest would be calculated on pecuniary damages awarded to plaintiffs by the jury of \$1,200,000 from the commencement of this action to the date of the verdict.

Settlement history, as between the parties to this verdict, reveals that there were only two offers, one by each party. Plaintiffs offered to settle with Defendants AOSHPI and A. O. Smith in October of 1990 for a total of 2.1 Million Dollars. On December 6, 1990, AOSHPI responded with an offer of \$250,000 to plaintiffs in return for a settlement of all claims against defendants separately named, which included all of them except Jerry Papenfuss. On December 10, 1990, Jerry Papenfuss's attorney notified plaintiffs that defendants' offer was intended to include Jerry Papenfuss.

Given the pecuniary damage award of \$1,200,000, the margin from plaintiffs' offer is \$900,000, and the margin from defendants' offer is \$950,000, so, given the test under M.S. 549.09, plaintiffs' offer is closer to the verdict. It should follow that plaintiffs are entitled to pre-verdict interest at the statutory rate from the date of commencement of the action to February 15, 1991, the date of the verdict.

Defendants, however, assert that plaintiffs' offer was not valid because its terms did not include disposition of pending crossclaims between some of the defendants. In Hodder v. Goodyear Tire & Rubber Co., (Minn. 1988) 426 NW2d 826, 840, the Supreme Court observed that "the statute aims to promote settlements and this is best accomplished by offers which are straightforward and would in an effective and practical manner settle matters between the negotiating parties." This reasoning does not favor defendants' position.

In this case defendants' objection has little to commend it because plaintiffs were not in a position to control disposition of any crossclaims between the defendants at the time the offer was made. It was for defendants to decide whether acceptance or rejection of plaintiffs' offer was in their interests. Their exposure to any existing crossclaims would be one factor to consider in evaluating such an offer. By their offer plaintiffs meant to release defendants AOSHPI and A.O. Smith from any and all claims upon acceptance. This is all the statute requires to be a valid offer.

Accordingly, pre-verdict interest should be awarded to plaintiffs from the date of commencement of the action.

V. Plaintiffs' motion for the allowance of costs and disbursements:

This Court will order that costs and disbursements to be taxed and included in any judgment that is entered, but the amount thereof will have to await determination in accordance with the procedures established by Rule 54.04, M.R.C.P.

VI. Plaintiffs' motion for attorneys fees and investigation costs:

Plaintiffs seek attorneys fees under M.S. 8.31, Subd. 1, and M.S. 325F. 67. Plaintiffs also seek application of M.S. 325F.67 and 325F.69, but because this Court determines that plaintiffs' claims come within the purview of M.S. 325F.67, it is not necessary to reach their claims under M.S. 325F.68 and 325F.69.

M.S. 325F.67 applies to advertising claims of any sort offered to the public which contain untrue, deceptive, or misleading statements of fact. M.S. 8.31 confers upon private persons the right to collect attorneys fees and costs of investigation upon the successful prosecution of false claims under M.S. 325F.69.

Upon the special verdict of the jury in this case, this Court has found that defendants A.O. Smith Harvestore Products, Inc., and A.O. Smith Corporation made false representations of existing material facts respecting the design of the Harvestore System for animal feed storage with the intention of inducing plaintiffs to purchase and use five Harvestore silos in their dairy farming enterprise. The evidence in this case established that the medium for the false representations included advertising claims published in magazine, books, pamphlets, and film.

All necessary elements to prove a violation of M.S. 325F.67 were proved in establishing the fraud upon which plaintiffs' verdict in this case was founded.

Defendants both contend that plaintiffs may not recover under this statute because they are "commercial" parties whom the statute is not intended to protect.

It is not helpful to focus on the status of a party, be it "commercial" or "consumer" or some other characterization, in determining the effect to be given to the statute.

It seems more appropriate to focus on the evident purpose of the statute, which is to protect the public from



false advertising claims. Indeed, in State v. AAMCO Automatic Transmission, Inc., (Minn. 1972) 199 NW 2d 444, a case in which the court was asked to interpret the precursor to M.S. 325F.67, the fact that the parties involved were "commercial" in orientation did not enter into the court's analysis, despite the obvious opportunity to do so considering that two of the litigations were commercial enterprises. The issue is not whether the litigant is a "commercial" or "consumer" party, but whether there is a public interest in letting the litigant bring forward its action that in part arises from false or deceptive ads. This view is attractive because it protects both consumers and commercial businesses from false ads, and encourages both to act on behalf of the public interest.

M.S. 8.31 appears designed to encourage private litigants to pursue false advertising claims in order to benefit the public generally by providing for the recovery of the costs of the litigation in the event an action is prosecuted successfully. See discussion of its purpose in Liess v. Lindemyer, 354, NW2d 556 (Minn. App. 1984).

Should the application of M.S. 8.31 be limited to claims under M.S. 325F.67 in which the potential for recovery is small, against the possibility that claims would not be brought at all because of the expense involved and thus the public purpose advanced by the statute would not be served?

In Nociemba v. G.D. Searle, (D. Minn. 1988) 680 F. Sup. 1293, 1304, a federal district court observed that narrowing the application of the statute to small fraud claims could not be founded upon a reading of the statute.

A reason advanced for extending coverage of M.S. 8.31 is to encourage parties to act as "private attorneys general" and collect fees for their work in advancing the public interest. See Liess, Id. at page 558.

In considering whether these plaintiffs advanced the public interest by pursuing this claim, there was evidence in this case that in excess of 70,000 Harvestore silos had been sold over the years by defendants. This Court finds that, to the extent plaintiffs have alerted users, and potential users, of Harvestore products of false claims used by defendants in advertising their products, the public interest has been well served. Accordingly, attorney fees and litigation expenses will be allowed.

#### VII. Punitive Damages.

In furtherance of the objectives of M.S. 549.20, Subd. 5, this Court makes the following specific findings respecting the jury's award of punitive damages:

1. Punitive damages were a proper subject for jury consideration in this case.
2. The representations of defendants which the jury found to be false extended over a period of years dating to the 1960's.
3. Essentially these presentations were intended to persuade potential purchasers that the design of the Harvestore silo prevented oxygen from coming into contact with feed stored in it, thus eliminating any risk of feed

spoilage with its attendant economic loss to the feed itself and exposure to animals of the its deleterious effects.

4. Defendants knew these representations were false because of complaints and lawsuits dating back to the 1960's and because of internal staff reports spanning the 1950's through the 1980's. For example, an internal memorandum (Exhibit 134) dated October 25, 1954, noted the following:

"On several occasion Management and Research, and undoubtedly the Harvestore Division, have been embarrassed for lack of knowledge and engineering data concerning the Harvestore. We are manufacturing and selling the Harvestore as an air tight structure for the improved storage of silage and other materials and yet we have little or no information concerning the performance of the Harvestore or the service conditions that actually exist in the field."

And more than 26 years later, an internal report (Exhibit 135) states in its Recommendation, at page 6 therein:

"There are great information gaps in our knowledge of not only structure breathing but also the effect of other sources or oxygen in the performance of our product."

5. No evidence of this internal struggle to establish definition for its product and to accommodate its product design to better preserve stored feed is to be found in its claim for its product to the public. For example, its

film (Exhibit 79) extols the Harvestore System as the answer to the problem of spoilage in stored feed, asserting:

"It has long been realized that in order to preserve feed, air must be kept from it. To accomplish this, farmers have packed hay tightly into bales. They have packed wet silage into bunkers, stacks and concrete structures. A.O. Smith engineers were faced with this problem of the need for the Harvestore to breathe while at the same time keeping the air from contacting the stored feed. They solved the problem by introducing balloon-like bags into the top of the Harvestore . . ." (See film transcript Exhibit 80, page 1, lines 11-22);

and,

"The difference between conventional storage and a Harvestore is more like the difference between a Model T and a jet plane." (Id. at page 16, line 8-10).

6. Defendants knew of the limitations of the Harvestore silo in preventing oxygen from coming into contact with stored feed, and knew of the potential its product had to cause herd damage and diminish milk production in dairy enterprises, yet they persisted in an advertising and marketing campaign over many years stressing product virtues they knew were false, all the while shielding from the public the information which undermined these claims.

7. Defendants' attitude manifested a willful indifference to the rights of the farming public in general,

and these plaintiffs in particular, to have information necessary to make informed judgments respecting the decision whether to integrate the Harvestore silo into their farming enterprise.

8. The amount of punitive damages assessed by this jury are reasonable and reflective of the hazard to the public arising from defendants' misconduct, extending as it has over many years and affecting farmers across this country. The amount, given the financial condition of defendants, should have a deterrent effect upon defendants' future advertising and marketing activities to the end that the buying public is better informed of the limitations inherent in the Harvestore silo.

Dated: this 10th day of June, 1991.

BY THE COURT:

/s/ John S. Gowan  
Hon. John S. Gowan  
Judge of District Court

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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

CIVIL DIVISION

TYPE OF CASE: PROPERTY DAMAGE

Court File no. 91-08583

MARVIN KLEHR and MARY KLEHR,

Plaintiffs,

VS.

A.O. SMITH HARVESTORE PRODUCTS,  
INC. A.O. SMITH CORPORATION MVBA  
HARVESTORE SYSTEMS, MINNESOTA  
VALLEY BREEDERS CO-OP, MID WEST  
BREEDERS CO-OP and 21st CENTURY  
GENETICS CO-OP,

Defendants.

AFFIDAVIT OF KAREN E. SPORS

---

Karen E. Spors, being duly sworn and under oath, states as follows:



1. I am an attorney employed by A. O. Smith Corporation as its senior counsel. In that capacity, I am familiar with, and have knowledge regarding, the litigation cited in this affidavit.

2. Attached hereto as Exhibit A is a true and correct copy of the jury's special verdict form in Albjerg vs. AOSHPI et al., State of Minnesota, Seventh Judicial District, Otter Tail County District Court, File No. 9-86-1015.

3. Attached hereto as Exhibit B is a true and correct copy of the special verdicts returned by the jury in Myers v. A. O. Smith Harvestore Products, Inc. et al., Payette County, Idaho, Case No. 8776 and the decision of the Court of Appeals of Idaho affirming the jury verdict cited as Myers v. A. O. Smith Harvestore Products, Inc. et al., 759 P.2d 695 (Id. App. 1988).

4. Attached hereto as Exhibit C is the trial court's Order and Judgment in Jordan v. A. O. Smith Harvestore Products, Inc. et al., File No. C82-244R (N.D. Ga. 1986), and an unpublished opinion from the 11th Circuit Court of Appeals affirming the jury verdict in favor of AOSHPI in that case.

5. Attached hereto as Exhibit D is the trial court's Opinion finding in favor of Defendant AOSHPI in Schmidlin v. A. O. Smith Harvestore Products, Inc., Civil File No. 83-1847-RE (D. Or. 1986); and Larson v. A. O. Smith Harvestore Products, Inc., Civil File No. 83-1848-RE (D. Or. 1986).

6. Attached hereto as Exhibit E is the trial court's Judgment and Order in favor of Defendants in Meuli vs. A. O. Smith Corporation et al., Case No. 84-1527-K (D. Kan. 1986, and Order and Judgment of the 10th Circuit Court of Appeals affirming the jury's verdict, cited as Meuli v. A. O. Smith, 865 F.2d 1150 (11th Cir. 1988).

7. Attached hereto is Exhibit F is a true and correct copy of the special verdict form in Dubbe v. A. O. Smith Harvestore Products, Inc. et al., State of Minnesota, First Judicial District, Scott County, File No. 84-06303, and Opinion of the Minnesota Court of Appeals cited as Dubbe v. AOSHPI et al., 399 N.W.2d 644 (Minn. at 1987).

8. In all of the cases cited above, the finder of fact returned a verdict or finding on issues of fraud in favor of AOSHPI and, where named as a Defendant, A. O. Smith Corporation. Punitive damages were not submitted to the jury in any of the above cases.

9. In the Minnesota cases of Albjerg, Dubbe, and Kapphahn v. A. O. Smith Harvestore Products, Inc. et al., First Judicial District, Carver County, Case File No. 85-20280, the trial court granted a directed verdict in favor of the Defendants before the case was submitted to the jury dismissing Plaintiffs' claims for punitive damages.

10. In addition to the cases cited above, I am aware of at least seven other cases against AOSHPI and/or A. O. Smith Corporation where punitive damages were not submitted to the jury, and at least four cases where punitive damages were submitted to the jury but where the jury returned a verdict

awarding no punitive damages against AOSHPI or A. O. Smith Corporation.

FURTHER YOUR AFFIANT SAYETH NOT

/s/ Karen E. Spors

Karen E. Spors

STATE OF MINNESOTA  
IN DISTRICT COURT  
COUNTY OF OTTER TAIL  
SEVENTH JUDICIAL DISTRICT

---

Jerry Albjerg,

Plaintiff,

-vs-

A.O. Smith Harvestore Products, Inc.

a Delaware corporation,

A.O. Smith Corporation, a New York

corporation, Valley Harvestore

Systems, a Minnesota cooperative,

Minnesota Valley Breeders Association,

a Minnesota cooperative d/b/a

Valley Harvestore Systems,

Defendants.

---

We, the jury in the above-entitled action for our Special Verdict answer the questions submitted as follows:

1. Did the Defendants make representations to the Plaintiff regarding the oxygen limiting capabilities of the Harvestore structure knowing that the representations were

false or stating them as true without knowing they were true or false with intent that the Plaintiff would rely on the representations which he reasonably did to his damage?

Yes \_\_\_\_\_

No X \_\_\_\_\_

2. If your answer to Question 1 is yes, were the representations a direct cause of the damage to the Plaintiff?

Yes \_\_\_\_\_

No \_\_\_\_\_

3. Did the Defendants breach any express warranty made by them concerning the features or use of the corn storage Harvestore structure?

Yes \_\_\_\_\_

No X \_\_\_\_\_

4. If your answer to Question 3 is yes, was the breach a direct cause of damages for the Plaintiff?

Yes \_\_\_\_\_

No \_\_\_\_\_

5. If you have answered Questions 1 and 2 yes, what sum of money, if any, would reasonably compensate the Plaintiff for the damage that he sustained as a result of the Defendants' false representation:

A) Forage Harvestore Structure \$ \_\_\_\_\_

B) Corn Storage Harvestore Structure \$ \_\_\_\_\_

C) Consequential damages: \_\_\_\_\_

Prior to  
October  
1981

Subsequent  
to  
October  
1981

i) Milk productions loss	\$ _____	\$ _____
ii) Additional supplements	\$ _____	\$ _____
iii) Purchase of additional equipment or fixtures	\$ _____	\$ _____
iv) Feed loss	\$ _____	\$ _____

6. If you have answered Questions 3 and 4 yes, what was the actual value of the corn storage Harvestore structure at the time that it was constructed on the Plaintiff's farm?

\$ \_\_\_\_\_

Dated: November 18, 1985 /s/ DeWayne A. Anderson  
Foreperson, if unanimous



IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF PAYETTE

Case No. 8776

DALE N. MYERS and ILA MYERS,  
husband and wife, and  
ALAN D. MYERS,

Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCT,  
INC., and ROCKY MOUNTAIN  
HARVESTORE, INC.,

Defendants.

SPECIAL VERDICT - ONE

We, the jury, answer the questions submitted to us in this special verdict as follows: In answering each question, at least nine (9) of us are persuaded, considering all of the evidence in the case, that our choice of answers is more probably true than not true.

1. Did defendant RMH make any of the following express warranties to plaintiffs which were breached:

ANSWER

- a. Increase in milk productions  
Yes \_\_\_\_\_ No X

- b. Not need protein supplements  
Yes \_\_\_\_\_ No X

- c. Less storage loss  
Yes \_\_\_\_\_ No X

- d. Harvestore structure was oxygen-limiting  
Yes \_\_\_\_\_ No X

If you answered any part of the above question "Yes", then please answer question 2. If you answered all of the above question "No", then sign the verdict form and go to the next verdict form and complete it. When you have completed all verdict forms, then inform the bailiff that you are done.

2. Did plaintiffs notify defendant RMH of any breach within a reasonable time after they discovered or should have discovered the breach?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

If you answered "No" to question 2, then you will not answer question 3, but will sign this verdict form and go to the next verdict form. If you answered "Yes" to question 2, then answer question 3.

3. Was any breach a proximate cause of damages to the plaintiffs?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

If your answer is "No" to question 3, then you will sign this verdict form and go to the next verdict form. If you answered "Yes" to question 3, then answer the questions in the Damages Verdict Form, and sign this form.

DATED: April 11, 1986.

FOREMAN

(Signatures Omitted in Printing)

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IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF PAYETTE

Case No. 8776

DALE N. MYERS and ILA MYERS,  
husband and wife, and  
ALAN D. MYERS,  
Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCT,  
INC., and ROCKY MOUNTAIN  
HARVESTORE, INC.,

Defendants.

SPECIAL VERDICT - TWO

---

We, the jury, answer the questions submitted to us in this special verdict as follows: In answering each question, at least nine (9) of us are persuaded, considering all of the evidence in the case, that our choice of answers is more probably true than not true.

1. Did defendant AOSHPI make any of the following express warranties to plaintiffs which were breached: ANSWER

a. Increase in milk productions  
Yes \_\_\_\_\_ No X

- b. Not need protein supplements  
Yes \_\_\_\_\_ No X
- c. Less storage loss  
Yes \_\_\_\_\_ No X
- d. Harvestore structure was oxygen-limiting  
Yes \_\_\_\_\_ No X

If you answered any part of the above question "Yes", then please answer question 2. If you answered all of the above question "No", then sign the verdict form and go to the next verdict form and complete it. When you have completed all verdict forms, then inform the bailiff that you are done.

2. Did plaintiffs notify defendant AOSHPI of any breach within a reasonable time after they discovered or should have discovered the breach?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

If you answered "No" to question 2, then you will not answer question 3, but will sign this verdict form and go to the next verdict form. If you answered "Yes" to question 2, then answer question 3.

3. Was any breach a proximate cause of damages to the plaintiffs?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

If your answer is "No" to question 3, then you will sign this verdict form and go to the next verdict form. If you answered "Yes" to question 3, then answer the questions in the Damages Verdict Form, and sign this form.

DATED: April 11, 1986.

FOREMAN

(Signatures Omitted in Printing)



IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF PAYETTE

Case No. 8776

DALE N. MYERS and ILA MYERS,  
husband and wife, and  
ALAN D. MYERS,  
Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCT,  
INC., and ROCKY MOUNTAIN  
HARVESTORE, INC.,

Defendants.

**SPECIAL VERDICT - THREE**

We, the jury, answer the questions submitted to us in this special verdict as follows: In answering each question, at least nine (9) of us are persuaded, considering all of the evidence in the case, that our choice of answers is based upon clear and convincing evidence.

1. Have the plaintiffs proved that defendant AOSHPI made to plaintiffs a statement of past or existing fact that was false and material under all the circumstances; that when AOSHPI made the statement AOSHPI knew it was false or did not know it was true; and that AOSHPI

intended that the plaintiffs should act on the basis of the statement in about the manner in which they did act?

ANSWER: Yes \_\_\_\_\_ No X

If you answered the above question "Yes", then please answer Question 2. If you answered the above question "No", then sign the verdict form and go to the next verdict form and complete it. When you have completed all verdict forms, then inform the bailiff that you are done.

2. Have plaintiffs proved that they did not know the statement was false; that plaintiffs did rely on the truth of the statement in their subsequent agreement to purchase of the Harvestore products in question; and that plaintiffs acted reasonably under all the circumstances in relying upon the statement?

ANSWER: Yes \_\_\_\_\_ No X

If you answered "No" to question 2, then you will not answer question 3, but will sign this verdict form and go to the next verdict form. If you answered "Yes" to question 2, then answer question 3.

3. Was plaintiffs' reliance on AOSHPI's fraudulent statement a proximate cause of damages to plaintiffs?

ANSWER: Yes \_\_\_\_\_ No X

If your answer is "No" to question 3, then you will sign this verdict form and go to the next verdict form. If you answered "Yes" to question 3, then answer the questions in the Damages Verdict Form, and sign this form.

DATED: April 11, 1986.

FOREMAN

(Signatures Omitted in Printing)

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IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF PAYETTE

Case No. 8776

DALE N. MYERS and ILA MYERS,  
husband and wife, and  
ALAN D. MYERS,

Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCT,  
INC., and ROCKY MOUNTAIN  
HARVESTORE, INC.,

Defendants.

SPECIAL VERDICT - FOUR

---

We, the jury, answer the questions submitted to us in this special verdict as follows: In answering each question, at least nine (9) of us are persuaded, considering all of the evidence in the case, that our choice of answers is more probably true than not true.

1. Was Alan Myers engaged in a joint venture with his parents for the production of milk; and was the purchase of the Harvestore products made for the joint venture to use; and was Dale Myers acting as agent for the joint venture in receiving and acting upon any express warranties;

and could defendants reasonably expect both Dale and Alan Myers to act upon the express warranties?

ANSWER: Yes \_\_\_\_\_ No X

2. Was an express warranty made directly to Alan Myers, and could defendants reasonably expect Alan Myers to act on the express warranty?

a. As to RMH: Yes \_\_\_\_\_ No X

b. As to AOSHPI: Yes \_\_\_\_\_ No X

3. Was the written contract between Dale Myers and RMH intended primarily for the benefit of Alan Myers as an "original purchaser or user"?

Yes \_\_\_\_\_ No X

If you answer all of the above questions no, then sign this verdict form. If you answer any of the above questions yes, then sign this verdict form and answer the questions in the Damages Verdict form.

DATED: April 11, 1986.

FOREMAN

(Signatures Omitted in Printing)

IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF PAYETTE

Case No. 8776

DALE N. MYERS and ILA MYERS,  
husband and wife, and  
ALAN D. MYERS,

Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCT,  
INC., and ROCKY MOUNTAIN  
HARVESTORE, INC.,

Defendants.

SPECIAL VERDICT - FIVE

We, the jury, answer the questions submitted to us in this special verdict as follows: In answering each question, at least nine (9) of us are persuaded, considering all of the evidence in the case, that our choice of answers is based upon clear and convincing evidence.

1. Was Alan Myers engaged in a joint venture with his parents for the production of milk; and was the purchase of the Harvestore products made for the joint venture to use; and was Dale Myers acting as agent in receiving and acting on any alleged fraudulent statement from AOSHPI;



and could AOSHPI reasonably expect both Dale Myers and Alan Myers to act upon such statement?

Yes \_\_\_\_\_ No X \_\_\_\_\_

2. Was any alleged fraudulent statement from AOSHPI made directly to Alan Myers, and could AOSHPI reasonably expect Alan Myers to act upon such statement?

Yes \_\_\_\_\_ No X \_\_\_\_\_

If you answer all of the above question no, then sign this verdict form. If you answer any of the above questions yes, then sign this verdict form and answer the questions in the Damages Verdict form.

DATED: April 11, 1986.

FOREMAN

(Signatures Omitted in Printing)

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IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF PAYETTE

Case No. 8776

DALE N. MYERS and ILA MYERS,  
husband and wife, and  
ALAN D. MYERS,

Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCT,  
INC., and ROCKY MOUNTAIN  
HARVESTORE, INC.,

Defendants.

DAMAGES SPECIAL VERDICT

We, the jury, answer the questions submitted to us in this special verdict as follows: In answering each question, at least nine (9) of us are persuaded, considering all of the evidence in the case, that our choice of answers is in accordance with the required burden of proof on damages.

4) You are now to determine the damages, if any, sustained by the plaintiffs.

a. difference at the time and place of acceptance between the value of the goods accepted and value they would have had if they had been as

warranted, unless special circumstances show proximate damages of a different amount.

\$\_\_NONE\_\_

- b. incidental damages, including any reasonably incurred expense incident to the breach.

\$\_\_NONE\_\_

- c. consequential damages resulting from defendant's breach.

\$\_\_NONE\_\_

The total amount of damages listed in a, b and c are:

\$\_\_NONE\_\_

5. You are now to determine what portion of the total damages sustained by the plaintiffs was proximately caused under each claim:

- a) RMH - warranty claim

\$\_\_NONE\_\_

- b) AOSHPI - warranty claim

\$\_\_NONE\_\_

- c) AOSHPI - fraud claim

\$\_\_NONE\_\_

DATED: April 11, 1986.

FOREMAN

(Signatures Omitted in Printing)

(Cite as: 114 Idaho 432, 757 P.2d 695)

Dale H. MYERS, and Ila Myers, husband and wife, and  
Alan D. Myers, Plaintiffs-  
Appellants,

v.

A.O. SMITH HARVESTORE PRODUCTS, INC.; A.O.  
Smith Corporation; and Rocky  
Mountain Harvestore, Inc., Defendants-Respondents,  
and  
Agristor Credit Corporation, Defendant.

No. 16599.

Court of Appeals of Idaho.

May 31, 1988.

Petition for Review Denied Sept. 14, 1988.

Buyers of feed storage and delivery system, who operated dairy farm, brought action against corporations that designed, manufactured, and sold the system. After grant of partial summary judgment to defendants on buyers' claims sounding in tort, and dismissal of variety of claims after presentation of plaintiffs' case, the District Court, Third Judicial District, Payette County, Wayne P. Fuller, J., entered judgment on jury's special verdict in defendants' favor, and buyers appealed. The Court of Appeals, Walters, C.J., held that: (1) defendants were not liable to buyers in negligence or strict liability as buyers' claim was for economic losses properly addressed as predicated upon contract claims rather than as tort claims; (2) written disclaimer was conspicuous and effectively excluded

implied warranties of merchantability and fitness for particular purpose; but (3) jury question was presented as to whether seller breached promise to provide expert and sound advice and assistance regarding operation of silo, and court should not have rejected that claim.

Affirmed in part; reversed in part; and remanded.

[1] PRODUCTS LIABILITY k17.1

313Ak17.1

Laws of negligence and strict liability impose no liability on manufacturer of product for defects which cause purely economic losses.

[2] PRODUCTS LIABILITY k17.1

313Ak17.1

Laws of negligence and strict liability impose no liability on seller of product for defects which cause purely economic losses.

[3] PRODUCTS LIABILITY k17.1

313Ak17.1

Designer, manufacturer, and seller of feed storage and delivery system were not liable to buyers of system who were operators of dairy farm for negligently advising buyers regarding operation of system and feeding of cattle, misrepresenting product, negligently designing and manufacturing product, or knowingly selling unreasonably dangerous product; economic losses suffered by buyers were properly addressed as contract claims rather than as tort claims.



[4] SALES k445(2)

343k445(2)

Whether disclaimer of implied warranties and acknowledgment by buyers was sufficiently conspicuous to effect waiver of implied warranties is question of law for court rather than factual question to be decided by jury. I.C. § 28-1-201(10).

[5] SALES k267

343k267

Written disclaimer of warranties with respect to feed storage and delivery system was conspicuous and effectively excluded implied warranties of merchantability and fitness for particular purpose; the statement was labeled as disclaimer in large, bold, capital letters and was written in bold, capital letters. I.C. § 28-1-201(10).

[6] SALES k267

343k267

Implied warranty claims were barred by disclaimer applicable to purchase of feed storage and delivery system, although buyers suggested seller's representative stated the side of the form containing parties' signatures did not relate to the purchase; the disclaimer was not part of the small print appearing on the signature page, and testimony did not suggest buyer was directed to ignore disclaimer, so there was no reason to refuse to enforce the disclaimer of warranties clause. I.C. § 28-1-201(10).

[7] APPEAL AND ERROR k1122(2)

30k1122(2)

Where only one conclusion can reasonably be drawn from evidence, question of fact may be decided by appellate court.

[8] PLEADING k48

302k48

Pleading requires only simple, concise and direct statement fairly apprising defendants of claims and grounds upon which the claims rest. Rules Civ.Proc., Rule 8(a)(1).

[9] APPEAL AND ERROR k766

30k766

Although substance of argument of appellant buyers of feed storage and delivery system, that jury should have been permitted to consider alleged breach of promise by seller to provide expert and sound advice and assistance regarding operation of silo, was not presented in opening brief, and seller accordingly did not have opportunity to respond directly in brief to a concise argument, the Court of Appeals would examine the substantive issue.

[10] TRIAL k165

388k165

Ordinarily, motion for dismissal in jury trial admits truth of adversary's evidence and every inference of fact which may be legitimately drawn therefrom. Rules Civ.Proc., Rule 41(b).

[11] APPEAL AND ERROR k1178(6)

30k1178(6)

Issue of whether seller of feed storage and delivery system failed to substantially perform alleged promise to provide expert and sound advice and assistance regarding operation of silo was for jury to decide, and court should not have rejected that claim; evidence permitted conclusion that alleged promise to provide advice and assistance had been made, court could not determine that the promise was satisfactorily

performed, and the case would thus be remanded for further proceedings to determine the issue.

[11] CONTRACTS k323(1)

95k323(1)

Issue of whether seller of feed storage and delivery system failed to substantially perform alleged promise to provide expert and sound advice and assistance regarding operation of silo was for jury to decide, and court should not have rejected that claim; evidence permitted conclusion that alleged promise to provide advice and assistance had been made, court could not determine that the promise was satisfactorily performed, and the case would thus be remanded for further proceedings to determine the issue.

[12] NEW TRIAL k22

275k22

Decision whether to grant new trial because of jury misconduct or irregularities in the proceedings rests in sound discretion of trial court. Rules Civ.Proc., Rule 59(a), pars. 1, 2.

[12] NEW TRIAL k44(1)

275k44(1)

Decision whether to grant new trial because of jury misconduct or irregularities in the proceedings rests in sound discretion of trial court. Rules Civ.Proc., Rule 59(a), pars. 1, 2.

[13] NEW TRIAL k143(5)

275k143(5)

Evidence of juror's statement, that several jurors declared immediately upon entering jury room that they had made up

their minds and that those jurors refused to participate in deliberations and played cards while remaining jurors deliberated, was inadmissible under evidence rule governing inquiry into validity of verdict or indictment, as no information was presented in affidavit suggesting that extraneous prejudicial information was improperly brought to jury's attention, outside influence was improperly brought to bear on any juror, or jury resorted to chance. Rules of Evid., Rule 606(b).

[14] NEW TRIAL k44(1)

275k44(1)

Even if evidence of juror's statement were admissible, information that several jurors declared immediately upon entering jury room that they had made up their minds and that those jurors refused to participate in deliberations and played cards while remaining jurors deliberated would not require new trial.

[15] CONSUMER PROTECTION k5

92Hk5

Idaho Consumer Protection Act is applicable to commercial transactions. I.C. §§ 48-601, 48-619.

[16] APPEAL AND ERROR k1067

30k1067

Any error in refusing to present claim under the Idaho Consumer Protection Act to jury in action by buyers of feed storage and delivery system against designer, manufacturer, and seller was harmless; jury was instructed regarding buyers' common-law fraud claims against designer and manufacturer, jury's responses to special verdict question included finding that designer and manufacturer did not falsely misrepresent

product to buyers, and buyers had presented no sound basis for jury to reach different result under the ICPA. I.C. §§ 48-601, 48-619; Rules Civ.Proc., Rule 61.

[16] APPEAL AND ERROR k1068(5)  
30k1068(5)

Any error in refusing to present claim under the Idaho Consumer Protection Act to jury in action by buyers of feed storage and delivery system against designer, manufacturer, and seller was harmless; jury was instructed regarding buyers' common-law fraud claims against designer and manufacturer, jury's responses to special verdict question included finding that designer and manufacturer did not falsely misrepresent product to buyers, and buyers had presented no sound basis for jury to reach different result under the ICPA. I.C. §§ 48-601, 48-619; Rules Civ.Proc., Rule 61.

[17] APPEAL AND ERROR k1067  
30k1067

Any error in rejecting instruction apprising jury of Idaho Product Liability Reform Act was harmless in action by buyers of feed storage and delivery system against designer, manufacturer, and seller of system; IPLRA itself created no new causes of action, but merely modified and clarified scope of existing product liability law, none of the modifications were particularly applicable to buyers' action, and of the theories listed in the proposed instruction, jury was instructed with respect to express warranties, and other claims were properly dismissed or otherwise disposed of before they reached jury. I.C. §§ 6-1401, 6-1410.

\*\*697 \*434 Larry C. Walker, Walker & Lindquist, Weiser, for plaintiffs- appellants.

Larry C. Hunter argued, and Douglas Martin Conde, Moffatt, Thomas, Barrett & Blanton, Boise, for defendants-respondents A.O. Smith Harvestore Products, Inc., and A.O. Smith Corp.

Theodore V. Wood, St. Clair, Hiller, Wood & St. Clair, Idaho Falls, for defendant-respondent Rocky Mountain Harvestore, Inc.

WALTERS, Chief Judge.

Dale and Ila Myers, operators of a dairy farm near New Plymouth, Idaho, purchased a feed storage and delivery system from Rocky Mountain Harvestore Products, Inc. (hereinafter Rocky Mountain). Alan Myers, their son, also fed his separately-owned cattle out of this unit. The system was designed and manufactured by A.O. Smith Harvestore Products, Inc., and A.O. Smith Corporation (collectively hereinafter A.O. Smith). Agristor Credit Corporation financed the purchase. [FN1] The Myers were dissatisfied with the system and sought help from Rocky Mountain. Eventually the Myers removed the system and brought this action against Rocky Mountain and A.O. Smith. The district court granted partial summary judgment to Rocky Mountain and A.O. Smith on the Myers' claims sounding in tort. Following a trial, the jury returned a special verdict in the defendants' favor. The court denied the Myers' subsequent motion for a new trial.

FN1. Early in this action the plaintiffs stipulated to dismissing Agristor and, hence, Agristor is not a party to this appeal.



The Myers contend the summary judgment was erroneous. They also challenge the court's decision to dismiss a variety of claims after presentation of the plaintiffs' case. They assert that their new trial motion should have been granted because of alleged jury misconduct. Five jurors allegedly announced an initial position at the outset of their deliberations and then refused to participate further in the deliberations. We reverse and remand as to one dismissed claim, an alleged promise by Rocky Mountain to provide expert assistance to the Myers, but affirm in all other respects.

The feed storage and delivery system consisted of a silo and a power-operated unloading unit, located in the bottom of the silo, for removal of the silo's contents. To preserve the nutritional value of the feed, the silo was designed to be oxygen-limiting. During an eighteen-month period after installation of the system, the Myers' combined dairy herd apparently suffered from decreased milk production. The Myers assert that the silo failed to function as promised, that Rocky Mountain failed to acknowledge or to successfully cure any defects, and, as a result, the Myers suffered significant losses. They theorize that the silo was unable to accommodate significant temperature fluctuations and permitted excess air exchange. Thus, the hay stored in the silo deteriorated and milk production declined. The Myers grounded their action on nine overlapping theories: (1) strict liability arising from affirmative misrepresentation; (2) common law deceit by misrepresentation; (3) common law deceit by intentional concealment of known defects; (4) breach of the written contract; (5) breach of express warranties; (6) breach of an implied warranty of merchantability; (7) breach of an implied warranty of fitness for a particular purpose; (8) strict liability arising from the sale of an unreasonably \*\*698 \*435

dangerous product; and (9) negligent design and manufacture of the product.

Prior to trial, the defendants moved for summary judgment. Concluding that only economic losses were being sought, the court dismissed the Myers' negligence and strict liability claims. After the plaintiffs' case had been presented to the jury, A.O. Smith moved to dismiss the breach of warranty claims, to dismiss all claims of Alan Myers, and to dismiss the fraud claims. Rocky Mountain requested that all claims against it be dismissed.

The court dismissed the claims which were based upon implied warranties and denied the motions with respect to express warranties. The court declined to dismiss the claim that A.O. Smith had misrepresented the oxygen-limiting nature of the system. However, concluding the evidence did not show that Rocky Mountain knowingly had made false statements, the court dismissed the fraud claim against Rocky Mountain. The other breach of contract claims were narrowed to the breach of a promise to properly install the system. The question whether Alan Myers stood in a relationship to the defendants which would permit recovery by Alan was retained for the jury. In sum, the only theories for recovery presented to the jury were those based on express warranties made by the defendants and the fraud claim against A.O. Smith. By special verdict, the jury found against the Myers on those claims.

On review, we have collated the issues raised by the Myers according to the various judicial acts challenged. We turn first to the district court's grant of partial summary judgment.

The Myers contend that employees of Rocky Mountain and A.O. Smith committed a variety of tortious acts including negligently advising the Myers regarding the operation of the system and the feeding of the cattle, misrepresenting the product, negligently designing and manufacturing the product, and knowingly selling an unreasonably dangerous product. The court granted summary judgment on these claims. The Myers contend that the court erred because these allegations presented questions of fact properly to be decided by a jury. For example, Dale Myers averred that employees of Rocky Mountain indicated that a dark color and strong odor were customary for feed stored in this type of silo and did not indicate reduced quality. The Myers offered evidence that these statements were erroneous.

The district judge concluded that the Myers were seeking to recover only economic losses arising from failure of the product to meet their expectation. Therefore, in the district court's opinion, the Myers could not prevail as a matter of law on their tort theories grounded in negligence and strict liability. The Myers contend that recovery in tort would be proper because the product caused property losses, namely damage to feed and to their cattle.

[1][2] Summary judgment is appropriate where a party is entitled to judgment as a matter of law after all facts and favorable inferences are drawn in the favor of the opposing party. See I.R.C.P. 56(c). The law of negligence and strict liability imposes no liability on the manufacturer of a product for defects which cause purely economic losses. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987);

*Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978). Nor does it impose a liability on the seller under such circumstances. See *id.* Cf. 2 RESTATEMENT OF TORTS § 402 A (1963). Thus, resolution of this issue turns upon a characterization of the Myers' alleged loss.

[3] On facts similar to those in the case before us, a federal district court in Minnesota concluded "as a matter of law that the alleged damage to the alfalfa feed and the Holstein cows is non-recoverable economic loss." *Agristor Leasing v. Guggisberg*, 617 F.Supp. 902, 908 (D.Minn.1985). The court reasoned that "[t]he essence of [the Guggisberg] complaint is that the Harvestore [silo] failed to perform as expected, \*\*699 \*436 and they seek to recover the resulting losses to their dairy farm...." *Id.* The court was not persuaded that physical damage to stored feed and dairy cattle resulting from feed deterioration was outside the sphere of economic loss. Citing *Guggisberg*, the instant trial court viewed the alleged harm to the Myers' feed and dairy cattle as economic losses not recoverable in tort.

This conclusion is consistent with decisions reached by other courts which have considered the same question. See, e.g., *Agristor Leasing v. Spindler*, 656 F.Supp. 653 (D.S.D.1987) (spoilage of feed causing medical, reproductive and production problems with dairy cattle and lost profit not recoverable in tort); *Agristor Leasing v. Kramer*, 640 F.Supp. 187 (D.Minn.1986) (reaffirming holding of *Guggisberg*); *Agristor Leasing v. Meuli*, 634 F.Supp. 1208 (D.Kan.1986). But see *Agristor Credit Corp. v. Schmidlin*, 601 F.Supp. 1307, 1316 (D.Or.1985) (denying summary judgment because "[w]hether a strict tort liability claim is available depends on the type of defect, not the type of injury").



Our Supreme Court has stated:

Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use.

*Salmon River Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 351, 544 P.2d 306, 309 (1975).

The distinction [between tort and contract or warranty recovery] rests ... on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.

*Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal.Rptr. 17, 23, 403 P.2d 145, 151 (1965). See generally Note, Economic Loss In Products Liability Jurisprudence, 66 COLUM.L.REV. 917 (1966).

Each case must be examined on its particular facts and in light of the foundations of the rule. Here, the Myers did not plead any specific damages due to losses in feed or cattle value. The losses suffered as a result of feed deterioration and cattle illness were manifested by income changes brought on by reduced milk production.

Arguably, the Myers did allege property damage resulting from a defective product. However, these injuries did not result from a calamitous event or dangerous failure of the product. Rather, they arose from the failure of the product to match the buyers' commercial expectations. In sum, the Myers' claim is for lost profits and consequential business losses resulting from alleged failures of the silo. "When a loss results from mere product ineffectiveness, it is the law of contracts and commercial transactions, rather than strict products liability, which fixes responsibility for the loss." *Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 223 (4th Cir.1982). Here these economic losses were properly addressed as predicated upon the contract claims, not in tort. *Clark v. International Harvester Co.*, supra. Therefore, we hold that the district judge properly dismissed the Myers' negligence and tortious strict liability claims.

## II

We turn next to the district court's decision to dismiss certain claims following presentation of the plaintiffs' evidence. Ruling from the bench, the district judge concluded that insufficient evidence had been presented for a jury to find a \*437 breach of an implied warranty and, further, that economic losses alone were not recoverable for \*\*700 breach of an implied warranty. [FN2] In addition, the court narrowed the breach of contract claim to a variety of oral promises and Rocky Mountain's written promise to properly install the system.

FN2. The court's latter conclusion of law is suspect. However, because our decision rests on the disclaimer



of any implied warranties, it is unnecessary for us to examine that particular ruling.

A

[4] We will first examine the implied warranties. A.O. Smith and Rocky Mountain support the district court's reasoning, and also assert that as a matter of law these warranties were disclaimed. Apparently the district court rejected the latter argument because the court believed the conspicuousness of the written disclaimer presented a factual question to be decided by a jury. However, that conclusion was erroneous. "Whether a term or clause is 'conspicuous' or not [for purposes of the Uniform Commercial Code] is for decision by the court." I.C. § 28-1-201(10). As explained below, our decision rests upon the disclaimer. Therefore, we do not reach the merits of the court's alternative reasoning.

The breadth of implied warranties is governed by the Uniform Commercial Code. See I.C. §§ 28-2-314, -315. Ordinarily, to be effective an implied warranty disclaimer must comply with I.C. § 28-2-316(2), which provides:

(2) Subject to subsection (3) [not applicable here], to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

"A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have

noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color." I.C. § 28-1-201(10).

[5] Here, the "order form" or purchase contract directed and required the buyer's signature not on the front of the form but on its reverse side. The side of the form upon which the signatures appear included the following bold heading and paragraph:

**SECOND DISCLAIMER**

**NO OTHER WARRANTY, EITHER EXPRESS OR IMPLIED AND INCLUDING A WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE HAS BEEN OR WILL BE MADE BY OR IN BEHALF OF THE MANUFACTURER OR THE SELLER OR BY OPERATION OF LAW WITH RESPECT TO THE EQUIPMENT AND ACCESSORIES OR THEIR INSTALLATION, USE, OPERATION, REPLACEMENT OR REPAIR. NEITHER THE MANUFACTURER NOR THE SELLER SHALL BE LIABLE BY VIRTUE OF THIS WARRANTY, OR OTHERWISE, FOR ANY SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE (INCLUDING BUT NOT LIMITED TO THOSE RESULTING FROM THE CONDITION OR QUALITY OF ANY CROP OR MATERIAL STORED IN THE STRUCTURE) RESULTING FROM THE USE OR LOSS OF THE USE OF EQUIPMENT AND ACCESSORIES. THE MANUFACTURER MAKES NO WARRANTY WITH RESPECT TO THE ERECTION OR INSTALLATION OF THE EQUIPMENT, ACCESSORIES, OR RELATED**

EQUIPMENT BY THE HARVESTORE DEALER, WHO IS AN INDEPENDENT CONTRACTOR, OR BY ANY OTHER INDEPENDENT CONTRACTOR. IRRESPECTIVE OF ANY STATUTE, THE BUYER RECOGNIZES THAT THE EXPRESS WARRANTY SET FORTH ABOVE, IS THE EXCLUSIVE REMEDY TO WHICH HE IS ENTITLED AND HE WAIVES ALL \*\*701 \*438 OTHER REMEDIES, STATUTORY OR OTHERWISE.[ [FN3]]

FN3. No issue having been raised regarding the "irrespective of any statute" clause, we intimate no view regarding its validity.

Dale and Ila Myers signed this form and initialed an "ACKNOWLEDGMENT AND RELIANCE," to the effect: I HAVE READ AND UNDERSTOOD THE TERMS AND CONDITIONS OF THIS PURCHASE ORDER INCLUDING THE WARRANTIES, DISCLAIMERS AND TERMS AND CONDITIONS HEREIN GIVEN TO ME, EITHER BY THE MANUFACTURER OR THE SELLER. I RELY ON NO OTHER PROMISES OR CONDITIONS AND REGARD THAT AS REASONABLE BECAUSE THESE ARE FULLY ACCEPTABLE TO ME.

Possibly because an exclusion may extend to a third party, see I.C. § 28-2-318 comment 1, Alan Myers has not contended that this disclaimer, if effective, is inoperative against him, a non-signing third-party.

As noted above, the question whether the disclaimer statement and acknowledgement was sufficiently conspicuous to effect a waiver is a question of law for the court. I.C. § 28-1-201(10); Glenn Dick Equipment Co. v. Galey Construction,

Inc., 97 Idaho 216, 541 P.2d 1184 (1975). The language quoted above is labelled as a disclaimer in large, bold, capital letters, and also is written in bold, capital letters. After examining the relevant exhibits, we hold that the written disclaimer was conspicuous and that the language effectively excluded implied warranties of merchantability and fitness for a particular purpose. Our holding is in accord with the conclusions reached by other courts which have examined nearly identical documents. E.g., Dubbe v. A.O. Smith Harvestore Products, Inc., 399 N.W.2d 644 (Minn.Ct.App.1987); Agristor Credit Corp. v. Schmidlin, 601 F.Supp. 1307 (D.Or.1985).

[6] Even if conspicuous, the Myers suggest the disclaimer clause should not be effective because a Rocky Mountain representative told Dale Myers that the side of the form containing the parties' signatures did not relate to his purchase. However, upon examining the referenced testimony we find a slightly different account of the execution of the document. On direct examination, Dale Myers testified:

Q: [T]here was [sic] some statements made by Mr. Collette concerning the back of this contract. What were those statements?

A: To the best of my recollection, Mr. Collette said that "That part of this contract has nothing to do with the equipment you're purchasing, the price of that equipment or anything of that nature. The back of this contract is the fine print, and you can read it." He handed me a pencil. I started to read it, and to me, it's small print, I did not read the whole thing. And he says, "When you get through, you can initial it here and sign it here."



That's what I done [sic].

[7] Where only one conclusion can reasonably be drawn from the evidence, a question of fact may be decided by an appellate court. See *Full Circle, Inc. v. Schelling*, 108 Idaho 634, 701 P.2d 254 (Ct. App. 1985). Here, the disclaimer was not part of the small print also appearing on the signature page. We find little in this testimony to suggest that Dale Myers was directed to ignore the disclaimer. On the contrary, he apparently was allowed to read it. Finding no reason to refuse to enforce the clause, we hold that the implied warranty claims were barred by the disclaimer.

#### B

Next we examine the trial court's decision to further limit the claim for breach of contract. Following presentation of the plaintiffs' evidence, the court granted a motion by the defendants to limit the breach of contract issue to oral warranties and to a claim that Rocky Mountain improperly installed the silo. The court subsequently \*439 \*\*702 rejected all jury instructions requested by the Myers describing non-warranty contractual duties and liabilities.

The Myers take issue with the court's rejection of their claim that Rocky Mountain failed to substantially perform a promise to provide expert and sound advice and assistance regarding three aspects of the operation of the silo-- feed rations, time-intervals for feeding use, and the addition of nutritional supplements to the hay in the silo. The Myers submit that the jury should have been permitted to consider the alleged breach of a promise to provide advice and assistance. In response Rocky Mountain presents four arguments: (1) no allegation of a failure to provide advice was included in the pleadings;

(2) the issue was not tried; (3) on appeal, the issue was raised belatedly in the Myers' reply brief, and (4) in any event, if such a promise was made, it was in fact performed. We will examine each response in turn.

[8] Modern pleading as reflected by I.R.C.P. 8(a)(1) requires only a simple concise and direct statement fairly apprising the defendants of claims and grounds upon which the claims rest. *Farrell v. Brown*, 111 Idaho 1027, 729 P.2d 1090 (Ct.App.1986). The Myers alleged that Rocky Mountain provided advice which did not cure all problems with the dairy herd, and stated a claim for breach of contract. After reviewing the Myers' complaint, we find the pleadings sufficient to raise this issue.

Nor can we say that the claim was not tried. The Myers presented testimony regarding nutrition advice provided by Rocky Mountain and expert testimony indicating the recommended rations were inappropriate.

[9] Although we must admit that the substance of the Myers' argument was not presented in their opening brief, the issue of breach of contract was listed and the supporting evidence was set forth. Unfortunately, the Myers concentrated their opening argument on their tort theories of negligent assistance and misrepresentation, rather than breach of a contract duty. Thus Rocky Mountain did not have an opportunity to respond directly in their brief to a concise argument. However, at oral argument, Rocky Mountain did address this issue and presented substantive rebuttal. Although we do not condone the Myers' delay, no prejudice is apparent and, therefore, we will examine the substantive issue.



[10] On motion of the defendants, the court would not permit the jury to consider the Myers' claim for breach of the promise to provide advice. The court's ruling was in effect a dismissal of that claim. Ordinarily, a motion for dismissal in a jury trial admits the truth of the adversary's evidence and every inference of fact which may be legitimately drawn therefrom. *Curtis v. Dewey*, 93 Idaho 847, 475 P.2d 808 (1970); see I.R.C.P. 41(b). Because the trial judge apparently believed express warranties to be the only contractual claims supported by the evidence, the judge also rejected many instructions sought by the Myers, relating to breach of contract.

[11] Our review of the record reveals that—viewing the evidence in the light most favorable to the Myers, as we must—the jury could reasonably have concluded that the alleged promise to provide advice and assistance had been made. We are unable to say that the promise was satisfactorily performed. That question of fact was substantially contested and, therefore, was properly for the jury to decide. Accordingly, we hold that the court erred by withholding this issue from the jury. We conclude that the case must be remanded for further proceedings to determine whether Rocky Mountain breached a duty to provide expert assistance to the Myers following installation of the silo and, if a breach occurred, whether compensable damages resulted.

### III

At the close of the trial, the jury returned a special verdict. The jury found that neither Rocky Mountain nor A.O. Smith had breached express warranties with respect to increased milk production, elimination of protein supplements, diminished feed storage loss, or the oxygen-limiting character

of the silo. The jury also \*\*703 \*440 found that A.O. Smith made no material, false representations. The jury rejected separate claims asserted by Alan Myers for recovery based upon theories of joint venture, contract, fraud and express warranty. Finally, the jury found that the Myers had sustained no direct damages in the form of decreased product value, nor any incidental or consequential damages, resulting from the equipment not being as warranted.

The Myers contend that this verdict is tainted and should have been set aside by the trial court on their motion for a new trial. They point to their counsel's affidavit recounting information indicating "several jurors" declared immediately upon entering the jury room that they had made up their minds. In their brief and at oral argument the Myers stated that this group of jurors totaled five in number. According to the affidavit, these jurors refused to participate in deliberations. Instead they allegedly played cards while the remaining jurors deliberated. Ultimately, ten of the twelve jurors concurred in the special verdict.

A.O. Smith and Rocky Mountain note that counsel's admittedly hearsay affidavit is the only evidence presented to show misconduct. See I.R.E. 606(b). They contend that this allegation, even if true, does not require setting aside the jury's verdict.

[12] A new trial may be granted because of jury misconduct or because of irregularities in the proceedings. I.R.C.P. 59(a)(1), (2). The decision whether to grant a new trial rests in the sound discretion of the trial court. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986); *Clark v. Foster*, 87 Idaho

134, 391 P.2d 853 (1964). Idaho Rule of Evidence 606(b) provides:

Inquiry to validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror and may be questioned about or may execute an affidavit on the issue of whether or not the jury determined any issue by resort to chance.

[13][14] No information was presented in the affidavit suggesting that extraneous prejudicial information was improperly brought to the jury's attention, that outside influence was improperly brought to bear on any juror, or that the jury resorted to chance. Accordingly, the evidence of a juror's statement contained in the affidavit was inadmissible. No other grounds for a new trial were presented. Therefore, the jury's verdict and the court's order denying the new trial motion are affirmed. [FN4]

FN4. Even if admissible, the information contained in the affidavit would not require a new trial. Apparently these jurors were simply quick to move to an unswerving position based on the evidence before

them. The Myers have not presented us with any authority holding that the type of behavior alleged here constitutes reversible misconduct. Although we do not condone such stubbornness on behalf of jurors when fulfilling their civic duty, we cannot say that, confronted with such behavior, a denial of a new trial would be an abuse of discretion.

#### IV

Finally we examine the Myers' contention that the trial court erred by rejecting jury instructions derived from two statutes: the Idaho Products Liability Reform Act, I.C. §§ 6-1401, -1410, and the Idaho Consumer Protection Act, I.C. §§ 48-601, -619.

#### A

[15] We turn first to the Idaho Consumer Protection Act (ICPA). The court dismissed this claim on two grounds: (1) the ICPA is not applicable to commercial transactions; and (2) failure to allege a violation \*\*704 \*441 of the ICPA. A.O. Smith contends that we should affirm on the second ground. We choose first to dispose of the court's theory that the ICPA is not applicable to commercial transactions.

Our statute does not expressly include or exclude commercial transactions. Compare Okla.Stat. tit. 15, § 752(B) (1981) ("Consumer transaction" means the advertising, offering for sale, sale, or distribution of any services or any property, tangible or intangible, real, personal or mixed, or any other article, commodity, or thing of value wherever situated, for purposes that are personal, household or business oriented.).



When construing the ICPA we are instructed to give "due consideration and great weight" to interpretations by the federal trade commission and the federal courts of § 5(a)(1) of the Federal Trade Commission Act. I.C. § 48-604(1). Our research has revealed no federal cases suggesting that the comparable federal act is not intended to protect the ultimate consumer of a product merely because that consumer intends to use the product in a for-profit business. After a review of the ICPA, the regulations promulgated by the attorney general pursuant to I.C. § 48-604(2), and the published decisions relating to the ICPA, we find little to support the court's conclusion. Both the statute and the regulation include the same broad, all-inclusive definition of goods as "any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, including certificates or coupons exchangeable for such goods." See I.C. § 48-602(6) and IDAPA 04.01.2,8. Finding no authority to the contrary, we hold that the ICPA is applicable to this type of transaction.

[16] Here, although the jury was not instructed under the ICPA, it was instructed regarding the Myers' common law fraud claims against A.O. Smith. Their responses to the special verdict question included a finding that A.O. Smith did not falsely misrepresent its product to the Myers. The Myers suggest that the knowledge that such misconduct was statutorily condemned, as well as being a common law misdeed, might have swayed the jury. We do not find this argument persuasive. Juries are presumed to render good, conscientious decisions whether the law is established by the courts or by the legislature. The Myers have presented no sound basis for a jury to reach a different result under the ICPA. We hold that the court's refusal to present a claim

under ICPA to the jury, even if error, constituted harmless error. [FN5] See I.R.C.P. 61.

FN5. Because we deem the error in this case to be harmless, we reserve for another day the question whether the ICPA must be specifically pled.

## B

[17] The Myers also contend the jury should have been apprised of the Idaho Product Liability Reform Act (IPLRA). The only proposed jury instruction which had particular reference to the IPLRA read:

The Myers additionally claim that the Defendants are liable or responsible to them under Idaho's Product Liability Reform Act. That Act provides four theories or rights of recovery: strict responsibility for a product breach of express warranty or promise; breach of an implied promise of a product's merchantability; and breach of an implied promise of a product's fitness for a particular purpose. The Myers claim that the Defendants are responsible to them under each of these rights of recovery.

This instruction, which was rejected by the court, contained no recovery theory not addressed elsewhere in the Myers' pleadings. The IPLRA itself creates no new causes of action; it merely modifies and clarifies the scope of existing product liability law. I.C. § 6-1401. None of these modifications was particularly applicable to this action.

Of those theories listed in the proposed instruction, the jury was instructed with respect to express warranties. We have held that the other claims were properly dismissed or



otherwise disposed of before \*\*705 \*442 they reached the jury. Error in denying an instruction may be harmless if the instruction was otherwise covered or if no prejudice resulted. See *Carpenter v. Double R Cattle Co.*, 108 Idaho 602, 701 P.2d 222 (1985); *Basye v. Hayes*, 58 Idaho 569, 76 P.2d 435 (1938). It is clear that this instruction would not have aided the jury in its task. Accordingly, we hold that any error in rejecting this instruction was harmless.

### CONCLUSION

As set forth above, we hold that the district court erred by dismissing the Myers' claim that Rocky Mountain may have breached a contractual promise to provide expert advice and assistance following installation of the silo. Therefore, the case is remanded for further proceedings consistent with that holding. In all other respects, the judgment of the court and the order denying a new trial are affirmed. Costs to appellants; no fees allowed.

BURNETT and SWANSTROM, JJ., concur.

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## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

GEORGE SCHMIDLIN and  
ENGLA SCHMIDLIN,

Plaintiffs, Civil No. 83-1847-RE

v.

A. O. SMITH HARVESTORE  
PRODUCTS, INC.,

Defendant.

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ROBERT M. LARSON and  
LORETTA LARSON,

Plaintiffs. Civil No. 83-1848-RE

v.

A. O. SMITH HARVESTORE  
PRODUCTS, INC.,

Defendant.

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Attorneys for Defendant.

#### OPINION

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REDDEN, Judge:

Plaintiffs sue alleging common law fraud and fraud by concealment. Trial was to the court. I find for the defendant.

This case has a long and complicated procedural history. It is not necessary to recount it here. Suffice it to say that these party plaintiffs sued A. O. Smith Harvestore Products, Inc. (AOSHPI), claiming that they were defrauded and induced to purchase grain storage units which are large,

cylindrical structures designed to store grain and forage used to feed livestock (silos). These plaintiffs had many additional claims against this and other defendants. Some of their claims were dismissed in earlier litigation and other claims, against other defendants, have been settled.

The thrust of the lawsuit is plaintiffs' contention that they were induced to purchase the silos through misrepresentation by the defendant. Generally, plaintiffs claim that the silos were advertised and sold as "oxygen free" or "oxygen limiting" when they were so constructed that they actually inducted oxygen into the silo and into contact with the contents. Defendant argues that its sales pitch claimed only that the silos were oxygen limiting and not oxygen free. Defendant contends that the silos are in fact oxygen limiting and that by reason of that fact the silos result in better quality feed combined with a lesser expenditure of time by the farmer-purchaser. Both plaintiff-families were experienced dairy farmers when they acquired and used the silos.

The Schmidlins bought a 20 foot by 77 foot silo in June of 1952 from a local dealer. It was intended for the storage of haylage, or medium moisture forage, for use in the Schmidlins' dairy.

The Larsons acquired two Harvestore structures, one 20 feet by 87 feet in 1980 and one 20 feet by 59 feet in 1981. These were acquired to store haylage and grain, respectively. The grain structure was primarily adapted for high moisture corn.

The silos were unique in that they were cylindrical, vertical feed storage tanks erected on concrete foundations,

made from numerous glass-coated steel plates bolted together and sealed so as to provide a permanent sealed storage. Further, each silo contained so-called "breather bags" installed inside said tanks which were intended to equalize inside and outside gas pressures. Each silo had a mechanical bottom loading device which is intended to unload from the bottom of the storage tank which is loaded from the top. Another unique feature was a top mounted gas pressure relief valve. It is advertised and designed to allow simultaneous loading (top) and feeding (bottom).

As stated, the plaintiffs here allege fraud and must prove their case by clear and convincing evidence. Oregon law controls here. The parties are in accord that the necessary elements of fraud, which plaintiffs must prove, are as set forth in plaintiffs' trial memorandum: 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity or ignorance of its truth; 5) his intent that it should be acted on; 6) the listener's reliance on its truth; 7) his consequent and proximate injury. Gardner v. Meiling, 280 Or. 665, 671, 572 P.2d 1012 (1977); U.S. National Bank v. Fought, 291 Or. 201, 220-221, 630 P.2d 337 (1981); Briscoe v. Pittman, 268 Or. 604, 610, 522 P.2d 536 (1974); Rice v. McAlister, 268 Or. 125, 128, 519 P.2d 1263 (1974); State ex rel Redden v. Discount Fabrics, 289 Or. 375, 384-385, 615 P.2d 1034 (1980).

Although plaintiffs assert that the fraud here is as described by Lord Blackburn<sup>1</sup> their fallback position is under

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<sup>1</sup> "... downright fraud; in plain English, and Scotch, also, it is a downright lie told to induce the other party to act upon it." Brownlie v. Campbell, L.R. S.A.C. 925

the fraud by concealment theory, and plaintiffs say, specifically, fraud by nondisclosure. Plaintiffs' trial memorandum, page 7. The necessary elements of proof for the plaintiffs are set forth in U.S. National Bank v. Fought, *supra*. Plaintiffs accurately quote those elements from Restatement (Second) of Torts § 551 (1977) at page 7 of their trial memorandum;

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or misleading a previous

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(1880). Plaintiffs' trial memorandum, page 2.



representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

The parties waived a jury and this case was tried to the court. I enter judgment for defendants for the reasons I will now set forth.

The plaintiffs' claim made through their own testimony and introduction of various exhibits, is that the defendant falsely represented that the silos were designed to limit the oxygen whereas they actually inducted it during the normal and recommended manner of operation. Plaintiffs claim that they relied upon the defendant's representations regarding the oxygen limiting operation. Plaintiffs, at times during their testimony, seemed to argue a theory that the product was sold as one which would completely eliminate oxygen "seepage" into the silo at contact with its contents. The plaintiffs, however, admitted that they knew some oxygen, of necessity, would contact some portions of the contents of the silos. This would necessarily occur both during loading and unloading. I find that the representation was that the silo was "oxygen

limiting" as opposed to "oxygen free" and find further that the silos were in fact oxygen limiting as represented.

Plaintiffs fail to prove, by clear and convincing evidence, that a false representation was here made. The representation was material, if not false. I find that the defendant believed the representation it made and that it did intend that plaintiffs also believe the representation and act thereon.

Plaintiffs did not prove, by clear and convincing evidence, that they relied upon the representation. Both plaintiffs conducted their own independent investigation of the product and the claims made thereto prior to their respective acquisitions. Both were experienced dairy farmers with good common sense who did not acquire with a belief that the silos were oxygen free.

Much of the evidence went to the point that defendant was aware the product was not perfect and that oxygen was allowed to enter. Specifically, plaintiffs showed that defendant had considered and rejected various additional and expensive devices which would, or could, have further limited oxygen contact. The defendant admittedly was, and presumably is, attempting to improve the product. The various methods and devices considered and explained at trial would have rendered the end product so expensive as to be impractical. Defendant's continuing research is not proof of a defective product and, more to the point, is not clearly convincing evidence of fraudulent conduct or representations.

The plaintiffs failed, in particular, to sustain their burden of proof that the silos "not only did not limit oxygen

but actually induced oxygen into the system and rotted the feed." For the reasons stated above I find that plaintiffs failed to prove these charges. Plaintiffs also contend under their concealment theory that defendant should have told them that the silos induced oxygen into the structure and throughout the ensiled feed during normal operation and use, resulting in a substantial deterioration in the nutrient content of the feed. They further contend that defendant should have advised them that the alleged oxygen induction had resulted in numerous claims and lawsuits across the country. They also contend that the oxygen induction problem had resulted in defendant withdrawing the silos from sale in the State of California. They then contend that had they been made aware of the above material facts, they would not have acquired the silos.

The evidence, as noted, disclosed that the silos did not induce oxygen into the structure within the meaning and use of that phrase by these plaintiffs.

It is true that lawsuits had been filed and that plaintiffs were not made aware of them. It is not clear how many of the lawsuits had been filed prior to plaintiffs' acquisition and whether knowledge of such lawsuits would have been material. I find that plaintiffs have not proved that the information would have been material or that they would have acted upon it and rejected the purchase of the silos. Plaintiffs have not proved that defendant had a duty to disclose existing litigation involving the product in a situation where plaintiffs had and exercised the opportunity to conduct an independent and detailed investigation into the operation of the product to determine whether it functioned as represented. Here, plaintiffs investigated the product thoroughly prior to

purchase, and one of them actually purchased a second unit after apparent satisfaction with the operation of the first unit purchased.

The plaintiffs proved no facts which would entitle them to recover for failing to disclose existing litigation under Section 551(2) of the Restatement, *supra*. As a matter of fact, in their trial memorandum plaintiffs do not contend they should recover under the concealment theory for alleged failure to advise of existing litigation. Plaintiffs urge recovery there under the theory that failure to advise plaintiffs that "the system not only failed to perform in the manner advertised but caused the feed to rot and, as a consequence, reduced the milk production of the cattle and caused the death of offspring." I have earlier indicated my findings on these issues which are contrary to plaintiffs' assertions.

The record in this case also revealed that the silos had been used and studied by large numbers of independent scientists and engineers as well as universities and found to have met with success. Further, numerous articles, studies and reports have been authored which supported the effectiveness of the silo structure. The defendant was entitled to rely on those documents and records. It was proved at trial that in the United States and Canada there are over 41,000 owners of some 74,000 such silos and that half of multiple unit owners acquired their second unit more than one year after acquiring the first. Such data, favorable to defendant, would reasonably have convinced it to represent its product as it did. Finally, I should point out that plaintiffs' approach to the concealment theory "is raised out of an overly developed and lawyerly sense of caution and it should be redundant given the fraud which occurred." Plaintiffs' trial memorandum, page 9.

The crux of plaintiffs' case is needed proof that the units acquired inducted, rather than limited, oxygen intake and, as a result, spoiled the stored contents. This they failed to prove.

Evidence demonstrated that many of the problems encountered by plaintiffs were the result of the manner in which they operated their dairy and that some of the problems were caused by others not a party to this litigation. In summary, I find that plaintiffs have failed to sustain their burden of proof that they were defrauded and that defendant prevails. Judgment shall enter accordingly.

This Opinion shall serve in lieu of my findings of fact and conclusions of law.

Dated this 24 day of October, 1986.

/s/ James A. Redden

James A. Redden  
United States District Judge

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**United States District Court**

**District of Kansas**

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GENE E. MEULI and ROSE MARIE MEULI

v.

A. O. SMITH CORPORATION, INC.;  
A. O. SMITH HARVESTORE PRODUCTS, INC.;  
MID-AMERICAN HARVESTORE, INC., and  
ROBERT GATTSHALL

CASE NUMBER: 84-1527-K

JUDGMENT IN A CIVIL CASE

- X   Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- X   Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Memorandum and Order filed April 29, 1986, and entered on the docket April 30, 1986, the motion for summary judgment of defendant A. O. Smith Corporation, is granted.

IT IS FURTHER ORDERED AND ADJUDGED that in accordance with the Order filed and entered on the docket

September 30, 1986, the motions for directed verdict of defendants Mid-America Harvestore, Inc., and Robert Gattshall are granted.

IT IS FURTHER ORDERED AND ADJUDGED that in accordance with the verdict returned by the jury September 30, 1986, plaintiffs Gene E. Meuli and Rose Marie Meuli take nothing, that the action be dismissed, and the defendant A. O. Smith Harvestore Products, Inc., recover of plaintiffs their costs of action.

APPROVED:

/s/ Patrick F. Kelly  
PATRICK F. KELLY

October 1, 1985  
Date

/s/ Ralph L. DeLoach  
Clerk

/s/ Ruth Thompson  
(By) Deputy Clerk  
Ruth Thompson

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(Cite as: 865 F.2d 1150)

AGRISTOR LEASING, Plaintiff,  
v.  
Gene E. MEULI and Rose Marie Meuli, Defendants, Third-  
Party-Plaintiffs,  
Appellants,  
v.  
A.O. SMITH HARVESTORE PRODUCTS, INC. and  
Mid-America Harvestore, Inc., Third-  
Party-Defendants, Appellees.

No. 86-2775.

United States Court of Appeals,  
Tenth Circuit.

Dec. 7, 1988.

Lessor brought action against farmers for breach of silo lease, and farmers counterclaimed and filed third-party action against silo manufacturer and silo distributor for breach of implied warranty of merchantability and fraud. The United States District Court for the District of Kansas, Patrick F. Kelly, J., dismissed distributor and returned verdict in favor of manufacturer, and farmers appealed. The Court of Appeals, Seth, Circuit Judge, held that excluding evidence pertaining to litigation over performance and marketing of manufacturer's silos in California over 20 years earlier was not abuse of discretion.

Affirmed.

See also, D.C., 634 F.Supp. 1208.

[1] FEDERAL CIVIL PROCEDURE k2011  
170Ak2011

Excluding evidence pertaining to litigation over performance and marketing of manufacturer's silos in California over 20 years earlier was not abuse of discretion in farmers' action against manufacturer for fraud and breach of implied warranty of merchantability; time differential, design changes and different climatic conditions created danger of unfair prejudice and danger of confusing issues. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[2] FEDERAL CIVIL PROCEDURE k2653  
170Ak2653

Even if trial court abused its discretion in excluding evidence concerning litigation over performance and marketing of manufacturer's silo in California over 20 years earlier to support farmers' fraud claim against silo manufacturer, error did not prejudicially affect farmers' substantial rights and could not form basis for setting aside verdict in favor of manufacturer; farmers were able to introduce evidence on each of issues raised by excluded evidence, and trial court preserved farmers' right to use evidence on cross-examination for rebuttal purposes. Fed.Rules Civ.Proc.Rule 61, 28 U.S.C.A.; Fed.Rules Evid.Rule 103(a), 28 U.S.C.A.

[3] FEDERAL COURTS k623  
170Bk623

Farmers' failure to object to dismissal of silo distributor on breach of warranty and fraud claims precluded consideration on appeal of whether dismissal was proper.

\*1150 Brock R. Snyder and Brian Frost, Topeka, Kan., for defendants, third-party plaintiffs, appellants.

Monte Vines and Clifford L. Malone of Adams, Jones, Robinson and Malone, Chartered, Wichita, Kan., for third-party-defendant, appellee A.O. Smith Harvestore Products, Inc.

William Hergenreter of Shaw, Hergenreter & Quarnstrom, Topeka, Kan., for third-party-defendant, appellee Mid-America Harvestore, Inc.

Before McKAY, SETH and ANDERSON, Circuit Judges.

SETH, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); Tenth Cir.R. 34.1.8. The cause is therefore ordered submitted without oral argument.

This appeal in a diversity action (a third-party action) arises from the lease of a "Harvestore" silo by Gene and Rose Marie Meuli (the Meulis). The silo was manufactured \*1151 by A.O. Smith Harvestore Products, Inc. (AOSHPI) and distributed through dealerships. The Meulis were approached about buying a Harvestore by Mid-America Harvestore, Inc. (Mid-America), the product's distributor for the area where the Meulis lived. After an extensive sales pitch by Mid-America's salesman, Robert Gattshall, the Meulis agreed to acquire a silo. Rather than buying it directly from Mid-America, they decided to enter into a lease agreement with



AgriStor Leasing. AgriStor purchased the structure from Mid-America and leased it to the Meulis.

After making their initial lease payments, the Meulis did not make the subsequent lease payments. AgriStor filed suit to repossess the silo, and for money damages under the lease. The Meulis counterclaimed and filed this third-party action against AOSHPI, AOSHPI's parent corporation, A.O. Smith Corp., Mid-America and Robert Gattshall, claiming that the silo's implied warranty of merchantability had been breached and that they had been induced to enter into the lease agreement through the use of fraudulent misrepresentations.

A.O. Smith Corp. and AgriStor were dismissed from the suit prior to trial. The case went to trial on the Meulis' claims of fraud and breach of the implied warranty of merchantability. Mid-America and Gattshall were dismissed at the close of the Meulis' case. The jury returned a verdict in favor of the remaining defendant, AOSHPI.

The Meulis raise two issues on appeal. First, they claim that the trial court abused its discretion under Fed.R.Evid. 403 by excluding evidence pertaining to litigation over the performance and marketing of the Harvestore silo in California in the 1960's. Second, they claim that the trial court's dismissal of Mid-America was erroneous under Fed.R.Civ.Proc. 41(b) and 52(a) since the trial court failed to offer any reason for the dismissal. Each of these issues will be considered after a brief review of the facts.

In its marketing the company describes several features that it urges make its product superior to conventional silos. The witnesses' testimony was directed to these features. The

Harvestore silo was characterized as an "oxygen-limiting" or "sealed" silo. Unlike conventional silos, which are open to fresh air, the walls, floor and roof of the Harvestore silo are airtight. This feature theoretically allows for less spoilage or loss of feed, and the feed should retain a higher percentage of nutrients. Silage acids can attack conventional structures made of concrete, galvanized steel or other materials. In theory, this deterioration will not occur in a Harvestore silo since it is made of heavy steel sheets that have a protective layer of glass fused into their surfaces. This forms a shield that repels silage acids and stands up to weathering. The impermeable construction of the silo thus enhances its "oxygen-limiting" capability. There were other claimed advantages from the silo's design.

The Meulis were told by Robert Gattshall, the salesman, that the added expense of the Harvestore silo would be offset by the savings that would accrue to their farming operation from the use of the silo. He estimated that the amount of money saved by the Meulis on protein supplement would more than cover the amount of their monthly rental payment. It was on the basis of these representations that the Meulis entered into the lease agreement for their Harvestore.

At trial, the Meulis claimed that the Harvestore did not produce the increase in feed quality that had been promised to them. Instead, they claimed the Harvestore silo's design was so flawed that the alfalfa stored within the structure actually experienced more exposure to oxygen than it would have in a more conventional silo. Their witnesses testified as to the design flaws, and that the oxygen which entered the silo caused more deterioration of the contents than for an ordinary silo.

The Meulis thus claimed that this influx of oxygen led to the deterioration of the alfalfa, which in turn reduced its nutritional value and led to reductions in the amount of weight gained by the Meulis' cattle. These allegations formed the basis \*1152 of the Meulis' claim that the Harvestore silo was unmerchantable.

The Meulis also claimed that they were induced into leasing the silo through fraudulent misrepresentations made on behalf of the product. The Meulis claimed that AOSHPI represented the silo to them as "oxygen-limiting" when it had known for years that the structural defects of the silo were allowing a significant amount of oxygen to come into contact with the feed stored inside. At trial, the Meulis sought to present evidence of the poor performance of the Harvestore silos in California in the early to mid-1960s by a witness who had owned Harvestore structures in California in the late 1950s and early 1960s and later became a Harvestore dealer there. As a dealer, the witness was involved in customer relations and had the opportunity to speak with many Harvestore customers throughout the state. In an in limine hearing the Meulis represented that the witness would testify as to design defects in the silo and failures in its performance in California in the early and mid-1960s. They also stated at the hearing that the witness would testify that he informed AOSHPI of these problems, that AOSHPI ignored his warnings, and that ultimately he was forced to join with many Harvestore customers in litigation against the company. The litigation resulted in a substantial settlement for the witness and settlements and verdicts for other plaintiffs.

[1] On the motion of AOSHPI, the trial court excluded the California evidence under Fed.R.Evid. 403, citing the dangers

of unfair prejudice and confusion of the issues. It is this ruling by the trial court that the Meulis challenge on appeal. They claim that this ruling affected their substantial right to prove their case since this evidence was essential to overcome the clear and convincing standard of proof they had to meet on their fraud claim as well as to overcome the aura of legitimacy and reliability surrounding a large company like AOSHPI.

This court has evinced a strong reluctance to upset a trial court's ruling on the admissibility of evidence under Fed.R.Evid. 403. "Challenges under Rule 403 call for balancing the probative value of and need for the evidence against the harm likely to result from its admission." *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1257 (10th Cir.). This balancing task "is one for which the trial judge, because of his familiarity with the full array of evidence in the case, is particularly suited." *Id.* (quoting *Rigby v. Beech Aircraft Co.*, 548 F.2d 288, 293 (10th Cir.)). "The decision to exclude (or admit) evidence under this rule is within the sound discretion of the trial court, and will not be reversed absent a clear abuse of discretion." *K-B Trucking Co. v. Riss International Corp.*, 763 F.2d 1148, 1155 (10th Cir.) (emphasis added). See also *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835 (10th Cir.); *Weir v. Federal Ins. Co.*, 811 F.2d 1387, 1396 (10th Cir.); *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159, 165 (10th Cir.).

During the in limine hearing, AOSHPI informed the court that it would respond to the Meulis' evidence on the California issues with evidence of three significant differences between the problems encountered by the Harvestore silo in California in the 1960s and the experiences of the Meulis in Kansas in the 1980s. AOSHPI noted that the incidents in California had



taken place many years before the Meulis leased their silo and the product had undergone many design changes during those years, that the large farm demands placed on the product in California were far different from the demands placed on the product by the Meulis, and that the oxygen-free representations made by AOSHPI about the product in California differed significantly from the oxygen-limiting ones made to the Meulis. AOSHPI had withdrawn from the California market and settled the claims made against it there.

Based upon the offers of proof from both parties, and the evidence presented at trial up to that point (virtually the entire case of the Meulis), the trial court ruled that because of the danger of unfair prejudice to AOSHPI and the danger of confusing the issues to the jury, the California evidence was inadmissible. Each of these findings \*1153 is clearly within the zone of the trial court's discretion within Rule 403. The record demonstrates the time differential, the design changes and the different climatic conditions. Thus the trial court justly could well conclude that each of these dangers outweighed the probative value of the evidence.

[2] Under Fed.R.Civ.P. 61 and Fed.R.Evid. 103(a), this court will not set aside the verdict of a jury based on an error in the admission or exclusion of evidence unless the error prejudicially affects a substantial right of a party. See *Beacham v. Lee-Norse*, 714 F.2d 1010, 1014 (10th Cir.); *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir.), cert. denied, 439 U.S. 862, 99 S.Ct. 183, 58 L.Ed.2d 171.

The Meulis presented evidence on each of the issues sought to be raised by the California evidence. On the issue of

whether the Harvestore was merchantable, the Meulis presented numerous witnesses, including experts, who testified that the Harvestore silo was the cause of reduced weight gain and disease among the Meulis' cattle. On the fraud claim, the Meulis introduced numerous internal research reports, correspondence, and internal memoranda, from both AOSHPI and its parent corporation, relating to the issue of whether AOSHPI had notice of defects in its product and failed to correct them. During the in limine hearing, the trial court noted that the Meulis had presented sufficient evidence to overcome AOSHPI's motion for a directed verdict on both the merchantability and fraud claims despite the exclusion of the California evidence.

The Meulis also claimed that the California evidence was needed to rebut perceptions of legitimacy and reliability that attach to large companies like AOSHPI. They claimed that the exclusion of this evidence left the jury with the impression that the Meulis were the only people challenging the reliability of the Harvestore and the honesty of AOSHPI. Again, the Meulis introduced a variety of evidence to rebut any preconceived perceptions by the jury regarding AOSHPI's reliability and legitimacy.

Because the Meulis were able to introduce probative evidence on each of the issues raised by the California evidence, and because the trial court was careful to preserve the Meulis' right to use the California evidence on cross-examination for rebuttal purposes (a right the Meulis never needed to use), we cannot say that the trial court's exclusion of this evidence prejudicially affected a substantial right of the Meulis. Thus, even if the trial court had abused its discretion in excluding the evidence, which it did not do, we could not under



Fed.R.Civ.P. 61 and Fed.R.Evid. 103(a) set aside the verdict of the jury in favor of AOSHPI. Beacham v. Lee-Norse, supra; Rasmussen Drilling, supra.

[3] The Meulis also appeal the trial court's dismissal of defendant Mid- America from the suit after the close of the Meulis' case, but it is clear from the record that the Meulis failed to properly object to the dismissal of either claim. This failure to object precludes us under these circumstances from considering this issue on appeal. Not only did the Meulis fail to object to the dismissal of Mid-America on the breach of warranty claim, they specifically assented to the dismissal.

At the end of the same hearing, the trial judge dismissed the case against Mid-America in its entirety. The trial judge did not offer a separate basis for the dismissal of the fraud claim against Mid-America. Nevertheless, the Meulis' counsel made no objection to the dismissal of the fraud claim, nor did he ask for a reconsideration of the dismissal of the breach of warranty claim. He did not request an explanation or clarification of the dismissal. The trial judge was very clear in ruling that the entire claim against Mid-America was being dismissed.

The judgment of the trial court is AFFIRMED.

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STATE OF MINNESOTA                      IN DISTRICT COURT  
COUNTY OF SCOTT                      FIRST JUDICIAL DISTRICT

File No. 84-06303

James Dubbe and  
Julie Dubbe,

Plaintiffs,

vs.

A.O. Smith Harvestore Products, Inc.,  
a Delaware corporation, Minnesota  
Valley Breeders Association, a  
Minnesota cooperative, d/b/a/ Valley  
Harvestore Systems,

Defendants.

SPECIAL VERDICT FORM

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We, the jury in the above-entitled caption, find as a special verdict the answers to the following questions submitted to us by the Court:

1. Did the defendant, A.O. Smith Harvestore Products, Inc., fraudulently misrepresent the feed storing capabilities of the Harvestore units to the plaintiffs?

Yes X No       

If your answer to question No. 1 is "no", you need not answer questions 2 and 3. If your answer to question No. 1 is "yes", then answer questions 2 and 3.

2. Did plaintiff James Dubbe reasonably rely upon the fraudulent misrepresentations?

Yes        No X

3. Was the misrepresentation by defendant A.O. Smith Harvestore Products, Inc., a direct cause of damage to the plaintiffs?

Yes        No X

4. Did the defendant Minnesota Valley Breeders Association fraudulently misrepresent the feed storing capabilities of the Harvestore units to the plaintiffs?

Yes X No       

If your answer to question No. 4 is "no", you need not answer questions 5 and 6. If your answer to question No. 4 is "yes", then answer questions 5 and 6.

5. Did plaintiff James Dubbe reasonably rely upon the fraudulent misrepresentations?

Yes X No       

6. Was the misrepresentation by defendant Minnesota Valley Breeders Association a direct cause of damage to the plaintiffs?

Yes        No X

7. Did the defendant, A. O. Smith Harvestore Products, Inc., violate the provisions of the False Statement and Advertisement Act as set forth in Minnesota Statutes, Sec. 325F.67?

Yes X No       

8. If your answer to question No. 7 is "no", then do not answer this question. If your answer to question No. 7 is "yes", then answer the following question:

Was such a violation a direct cause of damage to plaintiffs?

Yes        No X

9. Answer the following question bearing up damages regardless of the answers you have given to other questions. Your verdict is not complete unless you have answered this question.

What sum of money will fairly compensate plaintiffs for damages sustained as a result of the defendants' false misrepresentations?

a.	Silo value loss	\$ 50,000
b.	Lost milk production	\$ 14,200
c.	Death of cows	\$ 0
d.	Decrease in value of cows	\$ 0
e.	Lost calves	\$ 0
f.	Veterinarian services	\$ 0
g.	Purchase of feeds and feed supplements	\$ 10,000
h.	Discarded feed	\$ 0

Dated at Shakopee, Minnesota, this \_\_\_\_ day of February, 1986, at \_\_\_\_ o'clock \_\_.m.

Signed: \_\_\_\_\_  
Foreperson

Concurring jurors sign below only if there is a five sixths verdict.

(Signatures Omitted in Printing)

Dated at Shakopee, Minnesota, this 21 day of February, 1986, at 3:12 o'clock p.m.

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(Cite as: 399 N.W.2d 644)

James DUBBE, et al., Appellants,  
v.  
A.O. SMITH HARVESTORE PRODUCTS, INC.,  
Minnesota Valley Breeders Association,  
d.b.a. Valley Harvestore Systems, Respondents.

No. C0-86-1016.

Court of Appeals of Minnesota.

Jan. 27, 1987.

Review Denied March 13, 1987.

Buyers of silos brought action against manufacturer and dealer alleging breach of warranties and misrepresentation. The District Court, Scott County, Thomas R. Howe, J., dismissed breach of warranty claims and entered judgment in favor of defendants on misrepresentation claim, and buyers appealed. The Court of Appeals, Sedgwick, J., held that: (1) disclaimer of warranties clause in purchase agreements was valid, and (2) trial court's harmonization of jury's seemingly contradictory answers, finding that misrepresentations were not direct cause of damages but answering damages question, by failing to award damages was reasonable and within the court's discretion.

Affirmed.



[1] SALES k267

343k267

Disclaimer of warranties clause in agreement for purchase of silo was valid where it contained a capitalized, large print disclaimer identified as such, and merchantability was mentioned in the first sentence of the disclaimer. M.S.A. § 336.2-316.

[2] SALES k267

343k267

Disclaimer of warranties clause in contract for sale of silo was not invalid on theory that it was unconscionable and constituted a contract of adhesion, where buyer, a farmer, had prior experience in commercial dealings.

[3] TRIAL k358

388k358

Trial court possesses broad discretion in attempting to harmonize inconsistent answers of jury.

[4] SALES k422

343k422

Harmonization, by failing to award damages, of jury's seemingly contradictory answers, finding that misrepresentations by manufacturer and dealer were not direct cause of buyer's damages but also answering damages question was a total figure of \$74,200, was reasonable and within the court's discretion.

\*645 Syllabus by the Court

1. The trial court did not err in dismissing the breach of warranty claims when the disclaimer in the purchase

agreement was conspicuous, satisfied the requirements of the U.C.C. (Minn.Stat. § 336.2-316), and was signed by appellant who read, or had opportunity to read, the agreement.

2. The trial court did not abuse its discretion in harmonizing the jury's inconsistent answers on the special verdict form when the jury ascertained partial damages even though they found no direct causal link between one defendant's misrepresentations and appellants' damages.

Ronald H. Schneider, Schneider & Kallestad, Willmar, John L. Neveaux, Jr., Wayzata, Paul Roland Rambow, Minnetonka, for appellants.

Frederick W. Morris, Best & Flanagan, Minneapolis, for respondent A.O. Smith Harvestore Products, Inc.

J.P. Dosland, Dosland, Dosland & Nordhougen, Moorhead, for respondent Minnesota Valley Breeders Association, d.b.a. Valley Harvestore Systems.

Considered and decided by FORSBERG, P.J., and SEDGWICK and HUSPENI, JJ., with oral argument waived.

OPINION

SEDGWICK, Judge.

The Dubbes appeal from a judgment in favor of A.O. Smith Harvestore Products, Inc. (Harvestore), the manufacturer, and Minnesota Valley Breeders Association (MVBA), the dealer, of "Harvestore" silos. The jury found that both respondents misrepresented their product, but that the misrepresentations

were not a direct cause of appellants' damages. The action was based on the failure of two Harvestore storage units to operate as advertised, as well as on the resulting damage to appellants' dairy operation. Partial summary judgment was granted on the negligence and strict product liability claims. Prior to trial, the court dismissed the breach of warranty claims. The Dubbes allege that the breach of warranty claims should not \*646 have been dismissed and that the trial court's failure to award damages was not consistent with the jury's special verdict. We affirm.

### FACTS

In 1981 James Dubbe purchased his father's 160-acre dairy farm. The barn, milking facilities, and feed storage capacity were expanded in 1981. In July 1981 Dubbe purchased a Harvestore silo and unloader for \$24,800 and in October 1981 a hay silo and unloader for \$64,800. Both purchases were made through the Minnesota Valley Breeders Association, a local cooperative.

Harvestore advertised that their structures and storage methods limited oxygen contact with feed, resulting in higher quality feed, healthier animals and cost-savings. Appellant claims that use of the Harvestore units, costing nearly triple the price of conventional storage, resulted in moldy and heat-damaged feed which adversely affected his herd's health and milk production. Appellant alleges Harvestore technology actually enhances oxygen contact and is inferior to common concrete silos.

Appellant presented expert testimony that the breather bags, the heart of Harvestore's oxygen limiting technology, were

faulty in that they, in conjunction with the unloader, actually pumped oxygen into the silos. Harvestore's testimony was that their methods were "state of the art" and did limit oxygen contact with the feed. Appellant testified to problems with herd health and milk production and that the herd's decline coincided with Harvestore's arrival.

Harvestore blamed the herd's milk production decline on Dubbe's inexperience and inability to effectively manage a large herd. The parties disputed whether the silage was stored at the proper moisture levels for effective utilization of Harvestore technology.

The jury returned a special verdict which found that Harvestore and MVBA did "fraudulently misrepresent the feed storage capabilities of the Harvestore units," but did not find the misrepresentation to be a direct cause of Dubbes' harm.

### ISSUES

1. Did the trial court err in dismissing the Dubbes' claims for breach of express and implied warranties?
2. Was the special verdict inconsistent with the trial court's judgment?

### ANALYSIS

The trial court dismissed appellants' breach of warranty claims prior to trial. It is clear from the record that the trial court considered matters outside the pleadings, i.e., the bill of sale and deposition of James Dubbe. The motion to dismiss was



therefore converted into a motion for summary judgment. *McAllister v. Independent School District No. 306*, 276 Minn. 549, 551, 149 N.W.2d 81, 83 (1967). Accordingly, we will view the evidence in the most favorable light for the appellant. *Carney v. Central Life Assurance Co.*, 366 N.W.2d 351, 353 (Minn.Ct.App.1985). In evaluating summary judgment on the breach of warranty claims, we must determine:

- (1) whether there are any genuine issues of material fact and
- (2) whether the trial court erred in its application of the law. *Greyhound Lines, Inc. v. First State Bank*, 366 N.W.2d 354, 356 (Minn.Ct.App.1985), pet. for rev. denied (June 27, 1985) (quoting *Betlach v. Wayzata Condominium*, 281 N.W.2d 328, 330 (Minn.1979)).

[1] This case involves a sale of goods; consequently, the Uniform Commercial Code, as enacted into Minnesota law, must be applied. Minn.Stat. § 336.2-316 (1984) covers the exclusion or modification of warranties. Subsection (2) sets out the requirements for a valid disclaimer.

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion \*647 must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof." (Emphasis added.)

The Harvestore purchase agreements were similar. The front of the agreement was simply a bill of sale with space for the order to be listed. The back carried the terms of the sale. One

provision was listed as the "SECOND DISCLAIMER" which read:

NO OTHER WARRANTY, EITHER EXPRESS OR IMPLIED AND INCLUDING A WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE HAS BEEN OR WILL BE MADE BY OR IN BEHALF OF THE MANUFACTURER OR THE SELLER OR BY OPERATION OF LAW WITH RESPECT TO THE EQUIPMENT AND ACCESSORIES OR THEIR INSTALLATION, USE, OPERATION, REPLACEMENT OR REPAIR. NEITHER THE MANUFACTURER NOR THE SELLER SHALL BE LIABLE BY VIRTUE OF THIS WARRANTY, OR OTHERWISE, FOR ANY SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE (INCLUDING BUT NOT LIMITED TO THOSE RESULTING FROM THE CONDITION OR QUALITY OF ANY CROP OR MATERIAL STORED IN THE STRUCTURE) RESULTING FROM THE USE OR LOSS OF THE USE OF EQUIPMENT OR ACCESSORIES. THE MANUFACTURER MAKES NO WARRANTY WITH RESPECT TO THE ERECTION OR INSTALLATION OF THE EQUIPMENT, ACCESSORIES, OR RELATED EQUIPMENT BY THE HARVESTORE DEALER, WHO IS AN INDEPENDENT CONTRACTOR, OR BY ANY OTHER INDEPENDENT CONTRACTOR, IRRESPECTIVE OF ANY STATUTE. THE BUYER RECOGNIZES THAT THE EXPRESS WARRANTY SET FORTH ABOVE, IS THE EXCLUSIVE REMEDY TO WHICH HE IS ENTITLED AND HE WAIVES ALL OTHER REMEDIES, STATUTORY OR OTHERWISE. The "terms and conditions" section also contained a provision on "acknowledgment and reliance."



I HAVE READ AND UNDERSTOOD THE TERMS AND CONDITIONS OF THIS PURCHASE ORDER INCLUDING THE WARRANTIES, DISCLAIMERS AND TERMS AND CONDITIONS HEREIN GIVEN TO ME, EITHER BY THE MANUFACTURER OR THE SELLER. I RELY ON NO OTHER PROMISES OR CONDITIONS AND REGARD THAT AS REASONABLE BECAUSE THESE ARE FULLY ACCEPTABLE TO ME.

Dubbe signed both agreements following this provision. He also initialed the signature box on the first agreement, but he did not initial the second agreement.

Exculpatory clauses, while not favored by the law, may be valid between private parties. See *Walton v. Fujita Tourist Enterprises Co.*, 380 N.W.2d 198, 201 (Minn.Ct.App.1986), pet. for rev. denied (Minn. March 21, 1986). Moreover,

[a] clause exonerating a party from liability will be strictly construed against the benefited party. If the clause is ambiguous in scope it will not be enforced.

*Id.*

The purchase agreement contains a capitalized, large print disclaimer, identified as such. Merchantability is mentioned in the very first sentence of the disclaimer. Since Dubbe signed the back sheet, and stated he read the section, or at least a part of it, he was aware of the section's implications. The disclaimer clause in the purchase agreement was valid.

[2] Appellant alleges the disclaimer clause is unconscionable and constitutes a contract of adhesion. Parties to such contracts are commonly of unequal strength and business knowledge. In this case, both parties are informed business entities. Dubbe cannot claim to have been victimized by

Harvestore and MVBA since, as a farmer, he had prior experience in commercial \*648 dealings. See *Nelson v. International Harvester Corp.*, 394 N.W.2d 578, 581 (Minn.Ct.App.1986), pet. for rev. denied (Minn. Dec. 12, 1986).

The purchase agreements, coupled with James Dubbe's statement that he read, initialed, and signed the agreements, remove any issue of material fact as to the disclaimers and the trial court did not err in ruling Minn.Stat. § 336.2- 316 was satisfied. The disclaimer was bargained for between commercial parties and is valid.

The special verdict form contained nine questions. The jury found that MVBA and Harvestore fraudulently misrepresented the feed storing capabilities of Harvestore units and that Dubbe reasonably relied on the misrepresentation. However, the jury also found that the misrepresentations were not the direct cause of Dubbe's damages. The jury was required, in order to complete the verdict form, to answer the following damage question: "What sum of money will fairly compensate plaintiffs for damages sustained as a result of the defendant's false representations?" (Emphasis added.) Appellant claims that since the jury answered the damage question with a total damage figure of \$74,200, they intended that Dubbe receive this amount, notwithstanding their answers that misrepresentations by MVBA and Harvestore were not a direct cause of Dubbe's damage.

[3][4] The trial court attempted to harmonize the inconsistent answers of the jury. The trial court possesses broad discretion in this area. *Strauss v. Waseca Village Bowl*, 378 N.W.2d 131, 133 (Minn.Ct.App.1985). The applicable standard is

"whether the answers can be reconciled in any reasonable manner consistent with its fair inferences." Id. In its denial of appellant's post-trial motions, the trial court said in its accompanying memorandum:

On the special verdict form the jury stated that defendants' actions did not directly cause plaintiff's injuries. The jury may have reasoned a superseding cause caused plaintiffs' injuries. The jury's determination of causation is not such that the record compels a conclusion, as a matter of law, that defendants' conduct was the direct cause of plaintiffs' injuries.

Also, since the verdict form required damages to be ascertained even if direct cause was not attributed to the misrepresentations, the jury may have answered the question because they felt they had to do so. The trial court's harmonization of the jury's seemingly contradictory answers appear to be reasonable and within its discretion.

## DECISION

The trial court did not err in dismissing the breach of warranty claims since the disclaimer complied with the U.C.C. requirements and was included in a signed purchase agreement. The harmonization of the jury's inconsistent answers on the special verdict form was reasonable and did not constitute an abuse of discretion.

Affirmed.

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BROOKS FARMS, a Tennessee  
partnership,

Defendants,  
and

GEORGE C. BROOKS, SR. GEORGE  
C. BROOKS, JR., and CARL LEE  
BROOKS, d/b/a BROOKS FARMS, a  
Tennessee partnership,

Third-Party Plaintiffs-  
Appellees-Cross Appellants

v.

A.O. SMITH CORPORATION

Third-Party Defendant-  
Cross-Appellee

and

A.O. SMITH HARVESTORE PRODUCTS,  
INC., HERMITAGE HARVESTORE  
SYSTEM, INC., and FRAN OSBORNE,

Third-Party Defendants-  
Appellants.

OPINION FILED: January 31, 1990

WILLIAM H. INMAN, SPECIAL JUDGE

App. No. 89-194-II

Maury County Circuit  
The Honorable  
William B. Cain, Judge

CONCUR:

HENRY F. TODD, PRESIDING JUDGE

BEN H. CANTRELL, JUDGE

## OPINION

### I

Following a protracted trial<sup>1</sup> a jury awarded substantial compensatory and punitive damages to Brooks, dairy operators, against A. O. Smith Harvestore Products, Inc. (AOSHPI), Hermitage Harvestore Systems, Inc. ("Hermitage"), and Frank Osborne, arising out of the manufacture and sale of structures intended for the storage of cattle feed,<sup>2</sup> the putrefaction of which, according to the jury, resulted in decreased milk production and related, consequential damages.

Our consideration of the issues presented for review is governed by Rule 13, Rules of Appellate Procedures. We are not at liberty to weigh the evidence, but are limited to (1) a determination of whether there was presented material evidence to support the verdict, making the strongest legitimate view of all the evidence favorable to it, and discarding the contrary evidence, Pullins v. Fentress County

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<sup>1</sup>Thirteen weeks

<sup>2</sup>This litigation is somewhat complex, as one might assume from the participation of so many lawyers. It began as a simple action by the First National Bank of Louisville to recover the balance owing to it by Brooks for the lease/purchase financing the Harvestore system. A consent judgment was entered in favor of the bank.



Gen. Hosp., 594 SW2d 663 (Tenn. 1979), and (2) whether the issues presented for review, if decided favorably to the appellants, require a reversal and remand.

## II.

This litigation arose out of the acquisition and use of Harvestore agricultural feed and storage structures by third-party plaintiffs, George C. Brooks, Sr., George C. Brooks, Jr., and Carl Lee Brooks, d/b/a Brooks Farms, a Tennessee general partnership (the "Brooks"), in their dairy farm operations in Maury County, Tennessee. The Harvestore structures were manufactured by AOSHPI, which sold the structures to an independent dealer, the third-party defendant Hermitage, who, in turn, sold the structures to plaintiff, First National Bank of Louisville (the "Bank"). The Brooks entered into lease agreements with the Bank for possession, use, and ultimate purchase of the Harvestore structures and also signed written purchase orders with Hermitage.

The Brooks defaulted on their lease payments and the Bank commenced this action to recover the balance due. The Brooks filed a Third-Party Complaint against AOSHPI, Hermitage, and Hermitage's sales agent Frank Osborne ("Osborne"), seeking damages for innocent misrepresentation, manufacture of a defective product, breach of express and implied warranties, negligent design and manufacture, and unfair and deceptive acts or practices. Similar claims were brought by the Bank against the third-party defendants. The essence of the Brooks' claims was that AOSHPI's representations in its advertising brochures and promotional films regarding the Harvestore system of agricultural feed storage were false and that they relied upon those

representations in acquiring the Harvestore structures. The Brooks also sued AOSHPI's parent corporation, A. O. Smith Corporation ("Smith") on theories that it was directly liable for exercising dominion and control over AOSHPI or, alternatively, that it engaged in a civil conspiracy with AOSHPI, Hermitage and Osborne,<sup>3</sup> against Brooks.

AOSHPI denied the allegations of the Third-Party Complaint, and affirmatively asserted that the Brooks' alleged difficulties with the Harvestore structure were caused by their misuse and/or mismanagement of the equipment and whose poor performance in their dairy operations was allegedly due to a multitude of problems not related to the Harvestore structures. AOSHPI also contended that the Brooks' Third-Party Complaint was barred (1) by their contractual acknowledgment that they did not rely upon any representations and (2) by the statute of limitations.

## III.

Trial commenced on April 5, 1988. The trial issues were (1) the Bank's action against Brooks Farms, (2) the Brooks' allegations of innocent misrepresentation, negligent misrepresentation and fraudulent misrepresentation against AOSHPI, Hermitage and Osborne, (3) the Brooks' allegations against Smith of direct liability and their claim that the

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<sup>3</sup>The Brooks proceeded at trial against Smith on the theories of piercing the corporate veil and direct liability for exercising dominion and control of AOSHPI. A directed verdict was entered in favor of Smith on the direct liability theory and the jury returned a verdict in favor of Smith on the piercing of the corporate veil issue.

corporate veil should be pierced, and (4) the Bank's allegations against AOSHPI, Hermitage and Osborne of innocent misrepresentation, negligent misrepresentation, fraudulent misrepresentation and breach of warranty. A stipulated judgment was entered in favor of the Bank and against Brooks Farms. Directed verdicts in all of the Bank's claims against the third-party defendants were entered in their favor and against the Bank. A directed verdict was entered in favor of Smith as to the Brooks' claims of direct liability. The Brooks voluntarily dismissed their allegation of negligent misrepresentation against AOSHPI, Hermitage and Osborne.

On June 23, 1988, the jury returned a verdict in favor of the Brooks and against AOSHPI, finding innocent misrepresentation under proposed Section 552(D) of the Restatement (Second) of Torts, and intentional fraud, and against Hermitage and Osborne under proposed Section 552(D), and awarded compensatory damages in the amount of \$1,171,000.00. The jury also found against AOSHPI for intentional misrepresentation and assessed punitive damages in the amount of \$466,465.00. A verdict in favor of Smith on the issue of whether the corporate veil should be pierced was returned. Judgment was entered accordingly on July 29, 1988.

#### IV.

AOSHPI is a Delaware corporation with its principal place of business in Illinois, where it is engaged in the business of manufacturing agricultural equipment, including Harvestore structures. It is a wholly-owned subsidiary of A. O. Smith Corporation, a publicly-held company whose stock is traded on the American Stock Exchange. It owns several domestic

subsidiaries, numerous foreign subsidiaries, and has three major divisions which are engaged in a wide range of businesses.

The Harvestores are known as oxygen-limiting structures because they are not open at the top. The steel structures are glass-lined to resist acid and are coated with a sealer to stop air flow through the tank. These structures can be sealed between feedings and fillings so that, except under limited conditions, air does not enter and come in contact with the feed.

The Harvestore resembles a traditional farm silo. In 1980, it was manufactured and sold by AOSHPI, which, as stated, was a subsidiary of A. O. Smith Corporation, the marketer of the Harvestore. When AOSHPI was incorporated, Smith retained a royalty-free license for non-agricultural applications developed by AOSHPI from the technology related to the Harvestore or from technology developed by AOSHPI. As stated, the Harvestore was represented as being an "oxygen-limiting" feed storage structure that protected the stored feed from exposure to oxygen. Several types of advertising materials were utilized in selling the Harvestore structure to the Brooks. In addition to brochures furnished by Osborne describing the structure itself, there was a video tape presentation, "Research Bulletins," and a hardcover book titled The Winning System, all of which represented that the Harvestore patented breather bag system protected stored feed from oxidizing by preventing air from reaching the stored feed mass. Among the specific representations contained in the advertising were the following:



"1. The structure is as sealed a unit as can be practically assembled and operated. Air is not a substantial problem.

2. The tightly closed loading hatch and the bottom unloading system are designed to exclude air. The plastic "breather bags" control the air which enters and leaves the structure with changes in the atmosphere pressure and temperature thus avoiding unnecessary contact by air with the crop.

3. A. O. Smith engineers solved the problem of permitting the Harvestore structure to breath without letting air contact the stored feed by introducing balloon-like bags into the top of the structure. The air sucked into the Harvestore is contained in the bags so it does not come into contact with the feed.

4. The glass-fused-to-steel sheets are impervious to air. Each joint is coated with sealer, overlapped, firmly bolted and tested for air leaks."

#### V.

The thrust of the representation, as we gather, is that the Harvestore structures had the capability of storing feed without risk of damages from oxygen and was superior to other means of feed storage because after the oxygen entering the structure from the filling operation is exhausted, oxygen can no longer come into contact with the feed. As the trial judge observed:

All of these promotional documents submitted to the Brooks prior to the purchase of the Harvestores contained the clear representation that the only time oxygen could ever come into contact with the stored feed was during the initial loading process and that such small amounts of oxygen would be consumed within a matter of hours and that thereafter no oxygen could come into contact with the feed. These representations are plainly false. Aside from the fact that the Brooks would be presumed to rely upon these representations, there was adequate testimony of such reliance by George Brooks, Jr. and Carl Brooks. Reliance was thus a question of fact for the jury.

James Schaap, AOSHPI vice president of marketing, testified that AOSHPI had known about the problem of air entering the structure during feeding and through the relief valve since the Harvestore's inception, but was unable to determine its precise quantity. He further testified that if the representation was made in the Harvestore literature that the breather system prevents oxygen from coming into contact with the stored feed, such representation would be false. William Wallace, AOSHPI director of product engineering, agreed with Mr. Schaap regarding AOSHPI's lack of knowledge about the amount of air getting into the Harvestore and agreed that the representation that the breather system prevents oxygen from coming into contact with the feed is false.

Documents prepared by the Smith engineering department established that the Harvestore did not operate as represented, in that there are numerous avenues by which air can enter the structure. One of the principal avenues for air to



enter the structure is through the pressure relief valve. If the breather bags cannot hold enough air to compensate for pressure changes inside the structure caused by temperature swings, the pressure relief valve admits air into the structure. AOSHPI research documents indicate that temperature swings inside the structure of 50 degrees are common and that a ten percent breather bag capacity representing a ratio between the cubic space contained in the bag and the cubic space contained in the structure (as a whole) would be required to compensate for the pressure changes associated with such temperature swings.

According to a 1968 Smith research document, air also enters the structure through the unloading process which literally "pumps" air into the structure. This problem had still not been solved ten years later, and was the subject of a study in 1982. Among the named recipients of a 1982 study report was Donald Dunaway, then President of AOSHPI and a Smith officer.

AOSHPI represented that the Harvestore's fused glass and steel construction is impermeable to air. Smith research indicated that air entering through leaks in the structure is also a problem.

There was evidence that the Harvestore was sold by AOSHPI, under the management of Smith officers, upon the representation that its "patented breather bag system" protected the feed from the access of oxygen even though Smith knew air was getting into the structure.

## VI.

The Brooks owned and operated one of the largest dairy farms in Tennessee, known as Brooks Farms, which was founded by George Brooks, Sr. who later made two of his sons, George Brooks, Jr. and Carl Brooks, his full partners. Between them they had at least 67 years of dairy farm experience in 1980. George Brooks, Jr. was in charge of the milking herd, dry cow, heifer and calf program at Brooks Farms. Carl Brooks was in charge of the cropping program and maintains the equipment. George Brooks, Sr.'s wife, Mrs. Frances Brooks, maintained the books and records and acted as secretary of the partnership.

In February, 1980, shortly after the Brooks began the operation of their new dairy, Frank Osborne, a sales representative of Hermitage, called on them. He provided them with AOSHPI's films and literature regarding the Harvestore system. After reviewing the materials for several months and visiting other dairies in the area where Harvestore structures were in use, the Brooks informed Osborne of their decision to acquire four Harvestore structures in May, 1980. They had no direct contact with AOSHPI, and had no communication with any sales representative except Osborne. The only written AOSHPI communications the Brooks received were the film and literature provided by Osborne.

The Brooks signed five purchase orders for the structures, each of which included the following terms and provisions:

"10. The Seller hereunder is an independent contractor none of whose representations are binding on the Manufacturer [AOSHPI].

\* \* \*

4. Preamble - Buyer understands the conditions of use of the products and is not relying on the skill or judgment of the Manufacturer or Seller in selecting them because Buyer acknowledges that farming and livestock feeding results are very much the product of individual effort combined with various climatic, soil, water, growing and feeding conditions which are beyond the control of the Manufacturer and Seller. Buyer recognizes that any advertisements, brochures, and other written statements which he may have read, including any farm profit plan which may have been shown to him, as well as any oral statement which may have been made to him, concerning the potential of the Harvestore and or Slurrystore units and allied machinery and equipment, are not guarantees and he had not relied upon them as such because the products will be under Buyer's exclusive management and control . . . .

\* \* \*

#### ACKNOWLEDGMENT AND RELIANCE

I HAVE READ AND UNDERSTOOD THE TERMS AND CONDITIONS OF THIS PURCHASE ORDER INCLUDING THE WARRANTIES, DISCLAIMERS AND TERMS AND CONDITIONS HEREIN GIVEN TO ME, EITHER BY THE MANUFACTURER OR THE SELLER,

I RELY ON NO OTHER PROMISES OR CONDITIONS AND REGARD THAT AS REASONABLE BECAUSE THESE ARE FULLY ACCEPTABLE TO ME."

The first Harvestore structure was constructed at Brooks Farms by Hermitage on or about October 2, 1980, with financing being arranged by Osborne with the Bank on behalf of the Brooks. The fourth and final Harvestore structure was constructed by Hermitage in early December, 1980.

The Brooks claimed that the manner in which the structures were designed and engineered damaged rather than preserved feed and resulted in poor milk production by their dairy cattle. The Brooks alleged that their dairy cattle suffered nutritionally from eating feed stored in the structures, that they became sick and their milk production declined, which ultimately resulted in the loss of their dairy operation.

At trial, both sides introduced expert testimony to support their respective positions regarding the performance and utility of the Harvestore structures. On the one hand, the Brooks' experts testified that the Harvestore structures did not store feed properly and adversely affected the nutritional value of the feed which caused the health of the Brooks' dairy cattle to deteriorate and decreased their milk production. AOSHPI's experts, on the other hand, testified that when operated correctly the Harvestore structures function properly and, indeed, reduce the amount of feed losses far better than concrete stave silos or other conventional feed bunkers.

In addition, there was evidence that the Harvestore structures were not responsible for the poor health of the

Brooks' dairy herd or the economic results of their dairy business but, rather, they were caused by a multitude of unrelated problems, superimposed upon the Brooks' own farm management practices and their misuse of the structures. The jury resolved these disputed factual issues as heretofore stated. The trial judge approved the verdict and this appeal resulted.

## VII.

AOSHPI presents the following issues for review:

1. Whether summary judgment should have been entered in favor of a manufacturer on the purchasers' claims of misrepresentation when it was demonstrated that the purchasers had expressly acknowledged in writing that they did not rely on any representations other than those contained in the purchase orders.
2. Whether summary judgment should have been entered in favor of a manufacturer on the purchasers' claims of misrepresentation when it was demonstrated that the purchasers discovered or should have discovered the occasion, manner, and means which produced their injury more than three years prior to the filing of their cause of action.
3. Whether proposed Section 552(D) of the Restatement (Second) of Torts should be recognized as a valid cause of action in Tennessee.
4. Whether the trial court erred by excluding the testimony of the manufacturer's witnesses as evidence that the manufacturer's representations regarding the product were accurate and that any misrepresentations regarding the

product were accurate and that any misrepresentations were not intentional.

5. Whether the trial court erred by admitting a summary document when it was demonstrated that the summary was contradicted by prior sworn testimony and that it lacked a proper foundation.

6. Whether the trial court erred by admitting the testimony of the purchasers' damages expert, when such testimony was speculative, uncertain and not based on loss of net profit.

7. Whether the trial court erred in giving and refusing to give certain jury instructions.

8. Whether the punitive damage award violates the right to due process under the United States and Tennessee Constitutions.

## VIII.

We do not review the denial of summary judgment to a defendant except upon interlocutory appeal, since the grounds asserted by the defendant in his motion should be reasserted upon conclusion of the trial by motion for a directed verdict, see Williamson County Broadcasting Co. v. Williamson County Board of Education, 549 SW2d (Tenn. 1977) the denial of which is reviewable. We assume the first and second issues are directed to the action of the trial court in denying a directed verdict on the grounds asserted.



The purchase order signed by Brooks acknowledged that no reliance is placed on the "skill and judgment of the Manufacturer or Seller," and that Brooks has not relied upon the advertisements, brochures, oral or written statements of the Seller or Manufacturer. This defense has paramount significance, and we conclude that from all of the circumstances, including the marketing techniques employed, the Brooks were entitled to go to the jury on the issue.

They were inundated with sales materials which extolled the virtues of the Harvestore system. One of the principals, Osborne, admitted that these materials were intended to encourage reliance thereon by a purchaser. The evidence, except for the quoted disclaimer, is well-nigh conclusive that Brooks did indeed rely upon the host of sophisticated, impressive materials showered upon them. If reliance was not intended, the alternative postulate is that they were intended by the purveyors to lead a consumer into a sense of false security. These materials go far beyond the puffing of a product.

Material representations of the character and quality of the product contained in the printed advertising and promotional materials and films are a proper basis of a claim of fraudulent misrepresentation. Cooper Paintings and Coatings, Inc. v. SCM Corp., 457 SW2d 864 (Tenn. App. 1980) (roofing material); Ford Motor Co. v. Taylor, 446 SW2d 521 (Tenn. App. 1969) (farm tractor); Ford Motor Co. v. Lonon, 398 SW2d 240 (Tenn. 1966) (farm tractor); Mash, Inc. v. Fiat Allis Constr. Machinery, Inc., 461 F. Supp. 79, 80-81 (E.D. Tenn. 1978) (mining machine); Vicon, Inc. v. CMI Corp., 657 F.2d 768, 773-774 (5th Cir. 1981) (asphalt plant). The fact misrepresented must be a material one of importance

to the normal purchaser, by which the buyer may justifiably be expected to be influenced in buying the chattel. Williams v. Van Hersh, 573 SW2d 373, 376 (Tenn. App. 1978); Ford Motor Co. v. Taylor, *supra*, 446 SW2d at p. 526. Whether such representations are material is a question of fact for the jury. Cooper Paintings & Coating, Inc. v. SCM Corp., *supra*, 457 SW2d at p. 668; Ford Motor Co. v. Lonon, *supra*, 398 SW2d at p. 250.

The appellees argue that the law in Tennessee does not permit disclaimer of liability for fraud, and we agree. Fraud, when fully made to appear, vitiates all contracts into which it enters. Metropolitan Life Ins. Co. v. Hedgepath, 185 SW2d 906, 907 (Tenn. 1945); New York Life Ins. Co. v. Nashville Trust Co., 292 SW2d 749, 754 (Tenn. 1956); 17 Am. Jr. 2d, CONTRACTS, Section 191. Robinson v. Tate, 236 SW2d 445, (Tenn. App. 1950).

Regardless of the language employed, disclaimers of liability for fraudulent acts will not be endorsed because they are in violation of important public policy. We think the following quote essentially explains:

"Similarly, the law does not permit a covenant of immunity to be drawn that will protect a person against his own fraud; such a covenant is unenforceable because of public policy. A party to a contract cannot, by misrepresentation of a material fact, induce the other party to enter into the contract to his damage, and then protect himself from the legal effect of such misrepresentation by inserting a clause in the contract to the effect that he is not to be held liable for

the misrepresentation." 17 Am. Jur., CONTRACTS, Section 190."

We think the statements in Clements Auto Company v. Services Bureau Corp., 444 F.2d 169, 177-178 (8th Cir. 1971), cited and relied upon by the U. S. District Court of Tennessee in Mash, Inc., supra, 461 F. Supp. at p. 81 in holding that disclaimer of liability for tortious misrepresentation is ineffective, are meaningful.

"The law should not, and does not, permit a covenant of immunity to be drawn that will protect a person against his own fraud. Such is not enforceable because of public policy."

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"Language is not strong enough to write such a contract. Fraud destroys all consent. It is the purpose of the law to shield only those whose armor embraces good faith."

That this is the public policy of Tennessee is further evidenced by the adoption by the Supreme court of Section 195 of Restatement of the Law 2d, CONTRACTS, which provides:

[a] term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.

Adams v. Roark, 686 SW2d 73, 75 (Tenn. 1985); Houghland v. Security Alarms & Services, 755 SW2d 769 (Tenn. 1988).

Moreover, the public policy is further emphasized by TCA 47-50-112 which reads, in part, "nothing herein shall limit the right of any party to contest the agreement on the basis it was procured by fraud." Southern States Development Co., Inc. v. Robinson, 494 SW2d 777, 781 (Tenn. App. 1972) holds that the law will take whatever means are necessary to prevent fraud:

"This is so because the mind of man is infinite in its contrivances. No matter what laws are written for the purpose of preventing frauds, in time, man will discover some way to use the very law established to prevent frauds to protect one. Equity abhors fraud to such extent that new rules will be created or new exceptions to the rules will be announced, if there is no other way to prevent the reward of a fraud caused by a new and different scheme perpetrated for the same old end."

We accordingly find the first issue to be without merit.

#### VIII. (sic)

AOSHPI contends that TCA 18-5-105 prescribes a three years period within which Brooks is required to assert his claim, and that the complaint was not timely filed, according to the "overwhelming evidence." Much of the argument on the point overlooks the fact that this is a jury-tried case, and that the factual issues inherent in the issue of the statute of limitations was for determination by the jury.

There was evidence presented that it was not until 1983 that the Brooks either knew or in the exercise of

reasonable care should have discovered that the source of the problem was the Harvestore structures. Similarly to the factual situation in Foster v. Harris, 633 SW2d 304 (Tenn. 1982), the Brooks knew that they were having problems with milk production and animal health but testified that they did not know and could have known by the exercise of reasonable care and diligence, that the source of the problems was a tortious act, and that those problems were caused by the Harvestore structures. The Brooks consulted veterinarians and other experts in the dairy field to determine the source of the their problems. They had numerous contacts with representatives of and experts referred to them by the appellants. Significantly, each contact with the appellants or with experts referred by them indicated that the resource of the problem was something other than the structures in question, and there was testimony that Osborne repeatedly assured the Brooks that the problems were caused by reasons other than the Harvestore structures.

Expert testimony indicated that the Brooks exercised reasonable care and diligence in attempting to determine the source of their problems. As held in Hathaway v. Middle Tennessee Anesthesiology, 723 SW2d 355 (Ct. App. 1987) whether they exercised reasonable and diligent care in discovering this is a question for the jury. Moreover, there was evidence offered from which the jury could have found that the appellants' actions were designed to prevent the Brooks from discovering their cause of action. Fraudulent concealment tolls the statute of limitations. Cooper v. Cordova Sand and Gravel Co., Inc., 485 SW 2d 261 (Tenn. App. 1971); Ray v. Scheibert, 450 SW 2d 578 (Tenn. 1969); Howell v. Davis, 306 SW 2d 9 (Tenn. App. 1957); Union Carbide & Carbon Corp. v. Stephen, 237 F2d 329, 233 (6th

Cir. 1956). We accordingly find the second issue to be without merit.

## IX.

AOSHPI argues that the 552(D) action should not have gone to the jury, because it is essentially contractual in nature and there was no privity between Brooks and AOSHPI, against whom the claim of intentional misrepresentation was submitted to the jury.

In Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 SW 2d 240 (1966), the Supreme Court of Tennessee approved the proposed Section 552(D) of the Restatement of Torts (Second)<sup>4</sup> prior to the determination of whether it would be formally adopted in the Restatement, and it has not been adopted.

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<sup>4</sup>Proposed Section 552(D) permits recovery of pecuniary damages by the purchaser for the seller's innocent misrepresentations as follows:

One engaged in the business of selling chattel who, by advertising, labels or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for pecuniary loss caused to another by his purchase of the chattel in justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.



After Lonon was decided, the Advisory Committee gave special consideration to proposed Section 552(D) and decided that any liability under it was essentially contractual rather than tortious in nature. It was suggested that the sole comment under proposed Section 552(d) should state, "For details of the application of the principle of this Section, see the Uniform Commercial Code." See Restatement (Second) of Torts, Supplement, at 296. When this recommendation was reported to the Council, it voted to delete proposed Section 552(D) entirely, and apparently no other state has adopted or approved proposed Section 552 (D). But our Supreme Court, in Lonon, supra, approved 552(D) as applicable to tort actions and there the matter ends.

As stated, Section 552(D) specifically subjects sellers of chattels to liability for misrepresentation, and although it is a strict liability cause of action, we agree with Brooks that is not precluded by TCA 29-28-106(b), which provided:

(b) No product liability action is defined in section 29-28-106(b), when based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user or consumer unless said seller is also the manufacturer of said product or the manufacturer of the part thereof claimed to be defective, or unless the manufacturer of the product or part in question shall not be subject to service of process in the state of Tennessee or service cannot be secured by the long-term statute of Tennessee or unless such manufacturer has been judicially declared insolvent.

While none of the three threshold requirements for bringing in section precluded by TCA 29-28-106(b) against the seller is present in this case, we think the statute does not preclude all strict liability causes of action against a seller. TCA 29-28-106(b) only precludes causes of action which allege both (1) strict liability in tort and (2) "... which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user or consumer ... "

Since adoption of Section 552(D) in Ford Motor Co. v. Lonon, supra, many courts have held that there may be liability for pecuniary or economic loss resulting from misrepresentations. Several such cases have specifically cited proposed section 552(D) as the basis for liability. Cooper Painting & Coatings, Inc. v. SCM Corporation, 457 SW2d 865, 867 Tenn. App. 1970); Benco Plastics, Inc. v. Westinghouse Electric Corporation, 387 F. Supp. 772, 784 (E.D. Tenn. 1974); Walker Truck Contractors, Inc. v. Crane Carrier Company, 405 F. Supp. 911, 917 (E.D. Tenn. 1975); Vicon, Inc. v. CMI Corporation, 857 F. 2d 748, 775 (5th Cir. 1981). Other cases have held that there is liability for pecuniary or economic loss resulting from misrepresentations based upon the rule of Ford Motor Co. v. Lonon, though not specifically citing section 552(D). Walker v. Decora, Inc., 471 SW2d 773, 782 (Tenn. App. 1971); Jasper Aviation, Inc. v. McCullum Aviation, Inc., 497 SW2d 240 242 (Tenn. 1972); American Building Companies v. White, 640 SW2d 569 (Tenn. App. 1982). We accordingly find the third issue to be without merit.

Issues four, five and six complain of the admission or exclusion of evidence.

AOSHPI proffered the testimony of satisfied users of Harvestore structures. Objections to the admissibility of this testimony were sustained, but as we read the record, appellants nevertheless successfully persevered in their effort to prove a number of satisfied users and we do not see how the "exclusion" of such testimony prejudiced them.

The admission of a document which summarized milk production for seven years is assailed as misleading and unreliable, but the prerogative to agree or disagree was with the jury and in any event its admission rested within the sound discretion of the trial judge and we cannot find an abuse of his discretion. Emerson v. Gardner, 732 SW2d 613, (Ct. App. 1987). The same may be said of the contention that the testimony of the damages expert called by Brooks was too speculative and uncertain. We have examined this testimony closely and cannot say that the court abused his discretion in permitting the expert to testify. The testimony was within the gambit of the rules pronounced in American Builders v. DBH Attachments, 676 SW2d 553 (Ct. App. 1984).

We accordingly find these issues to be without merit.

#### XII. (sic)

AOSHPI tendered special jury instructions, which were refused, and insists that the instructions as given did not cover every issue of fact or theory supported by the evidence. We do not agree.

George Brooks, Sr., and his wife, Frances Brooks, did not testify, which impels AOSHPI to argue that the "failure to call a witness" charge should have been given. This charge is essentially boiler-plate, and may be found in Tennessee Pattern Jury Instructions 2.03. The principal reasons advanced are (1) because Brooks, Sr. signed the purchase order which contained the disclaimer of reliance, and (2) because he had knowledge of the date of the accrual of the cause of action.

So far as this record reveals, these prospective witnesses were equally available to the appellant. The Rules of Civil Procedure authorize the calling of an adverse witness, and provide ample protection to the party exercising the privilege. No longer does a party call a witness at his peril. Moreover, the discovery depositions of these witnesses were available to AOSHPI. Under these circumstances, and the cumulative effect of their testimony aside, we cannot find that the trial judge was in error in refusing the requested instruction. See, Baker v. Baker, 24 Tenn. App. 283 (1940).

#### XIII.

It is next contended that the jury should have been instructed on AOSHPI's theory of alternative causation, as follows:

If you find that it is equally probable that the injuries complained of by the Brooks partnership may have resulted from any of several causes, and the Third-Party Defendants or Defendants are responsible for only one of the causes, then any choice between them would be a matter of conjecture. No recovery can be permitted if the evidence leaves it to conjecture as to



which of several causes may have resulted in the injury where the Third-Party Defendants are liable for only one of them.

AOSHPI relies on Williams v. M.C. West Const. Co., 579 SW2d 883, (CT App. 1978) as authority for its insistence that the requested instruction should have been charged, since Tennessee law does not permit recovery if the "evidence leaves it to conjecture which of two probable causes resulted in the injury where the defendant was liable for only one of them". The operative word here is "conjecture", and under the evidence presented in this case, the jury was not required to indulge in speculation as to the cause of the disaster which befell the appellees. Campbell v. Campbell, 199 SW2d 951 (Ct. App. 1947) is authority for the dogma that because the injury possibly could be attributable to extraneous causes did not exonerate a defendant wherein the jury concluded that the breach of the duty charged was the cause of the injury. It is not required that the evidence must exclude the possibility that the injury resulted from a cause differing from that alleged. Standard Oil v. Roach, 94 SW2d 53 (Ct. App. 1936).

AOSHPI offered evidence in abundance that the troubles experienced by Brooks were caused by misfortunes wholly unrelated to the Harvestore structures. Conversely, Brooks offered much evidence that the Harvestores were the sole cause of their problems. We can only say, as we must, that it was within the peculiar province of the jury to decide the issue upon a preponderance of all the evidence which in no wise entailed speculation. Moreover, the jury was forcefully instructed that it could award damages only for those injuries which it found to have been proximately caused by the actions of the defendants. These issues are without merit.

#### XIV.

AOSHPI insists that its special request.

"No evidence has been presented which would permit you to conclude that Frank Osborne and/or Hermitage Harvestore Systems, Inc. ("Hermitage") were agents of A.O. Smith Harvestore Products, Inc. ("AOSHPI"). I therefore, charge you that you are not to consider oral representations made by Mr. Osborne and/or Hermitage in any way against AOSHPI. Similarly, you are not to consider against AOSHPI any written representation of Mr. Osborne and/or Hermitage unless they were prepared by AOSHPI."

should have been charged. We do not agree that the requested charge accurately reflects the law in Tennessee, or, even so, that it was relevant under all the evidence, because, much like the pattern in Cooper Paintings and Coatings, Inc. v. SCM Corp., 457 SW2d 864 (Ct. App. 19776), reasonable inferences to be derived concerning the authority of Osborne could justify the conclusion that for the purposes of this case he was a special agent of AOSHPI. In any event, the trial judge instructed the jury that

"Osborne was not the agent of AOSHPI, that each defendant was entitled to fair and separate consideration, that evidence should be considered against AOSHPI on the one hand and against Hermitage and Osborne on the other and that as to AOSHPI it should determine whether " 'the advertising for promotional literature of films' contained misrepresentations while instructing



separately as regards Hermitage and Osborne that it must determine if the 'advertising, promotional literature, film or oral or written statements' contain misrepresentations."

These instructions were sufficient.

#### XV.

AOSHPI next claims that the jury should not have been instructed that "a duty to disclose known facts arises where one party knows of material facts and also knows that such facts are neither known nor readily accessible to the other party." We are somewhat at a loss to understand this argument; the instruction reflects not only Tennessee law, but so far as we can determine, the law in all of the states. See, Belote v. Memphis Development Co., 346 SW2d --1. (Tenn. 1961). Its relevance to the case at hand seems apparent.

#### XVI.

Finally, AOSHPI contends that the punitive damages award is violative of due process.

It is fair to observe that no judge of this Court is enthusiastic about punitive damages. Whether, as stated by the United States Supreme Court in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 57 U.S.LW 4985 (June 1989), due process acts as a check on unbridled jury discretion to award punitive damages has not been determined by the Supreme Court of Tennessee. We take note that guidelines for the award of such damages are

somewhat sparse, but the Supreme Court, in Coppinger Color Lab, Inc. v. Nison, 693, SW2d 72 (Tenn. 1986) held.

[S]uch an award will be set aside if it is grossly excessive or appears to be the result of passion, prejudice, improper sympathy, or for some other reason appears to constitute an injustice . . . The factors to be considered in assessing the award include the nature of the defendant's acts, the amount of compensatory damages awarded and the wealth of the particular defendant. The more reprehensible the act, the greater the appropriate award of punitive damages.

While AOSHPI offers persuasive reasons why the lack of plenary guidelines is offensive to the process requirements, we note that the compensatory damages award was \$1,171,000.00, and the punitive damages award was \$466,465.00. We cannot say, assuming the validity of the concept of punitive damages, that the facts of this case do not justify an award of such damages, or that the award is disproportionately excessive. Even the trial judge took the somewhat unusual step of filing a comprehensive opinion, overruling the motion for a new trial, in which he made reference, essentially, that any trier of fact would conclude that the fraud practiced on the plaintiffs was gross indeed. As we understand, it is not the amount of the punitive damages, but the concept, that is assailed; and as to this, we defer, as we must, to the Supreme Court, or to the Legislature. We do indulge the observation that unbridled jury discretion has never been fostered in Tennessee.

## XVII.

The verdict against Hermitage Harvestore Systems and Frank Osborne on the strict liability issue, (Section 552(D) of the Second Restatement), was also approved by the trial judge. These appellants present for review the propriety of the submission of the case on the 552(D) theory, and we think the comments of the trial judge are especially apropos:

"These defendants first assert that the action at bar cannot lie because of the Tennessee Products Liability Act of 1978, codified as TCA 29-28-101 et seq. This statute, however, applied by its terms to "... all actions brought for or on account of personal injury, death or property damage caused by or resulting from ..." that which is defined as a "product" within the meaning of the statute (TCA 29-28-102(6)). While such statute would apply to claims under 402(a) and 402(b) of the Restatement as adopted in Ford v. Lonon because both of these sections dealing with "physical harm" necessarily mean "... personal injury, death or property damage ...". The basis, however, for liability of Hermitage Harvestore and its agent, Frank Osborne, is the adoption in Ford v. Lonon of the rule stated in Section 552(d) of the tentative draft of the Restatement holding a seller liable for "... pecuniary loss ..." caused by reliance upon misrepresentation of material facts by the seller. Ford Motor Co. v. Lonon, 498 SW2d 240, 246-247. Relying on the celebrated case of Selly v. White Motor Co., 45 CV. 17, 403 P.2d 145 (1965), the Supreme Court of Tennessee asserts:

"... While in a commercial loss case the strict tort liability developed in 2 Restatement (Second) Torts Section 402(a)(1965) cannot be imposed, a comparable liability without negligence can be imposed where the manufacturer has made representations that his product is free from defects in material and workmanship even though there is no privity of contract."

(Emphasis added.) 398 SW2d 240, at 250.

"It is of no consequence that the American Law Institute never actually adopted Section 552(d) of the tentative Restatement. The Supreme Court of Tennessee clearly did adopt it in Ford Motor Co. v. Lonon, and such holding has never been overruled, limited or restricted by subsequent appellate decisions in Tennessee.

The charge to the jury made it clear that the jury was required to consider the case against Hermitage Harvestore Systems, Inc. and its agent, Frank Osborne, separate and apart from the parallel case against A. A. Smith Harvestore Products, Inc. The jury was in deliberation in this case for nearly seven full days with both the verdict form and the charge of the law in the hands of the jury throughout such deliberations.

The Court is satisfied that the case against Hermitage Harvestore Systems, Inc. and its agent, Frank Osborne, was fairly tried under admissible



evidence and that the verdict of the jury is in conformity with the weight of the evidence."

We agree with these comments and conclusions.

#### XVIII.

These appellants contend the trial court should have charged the jury that the applicable statute of limitations began to run from the date of the distribution of the materials, rather than from the date of the discovery of the cause of action. They argue that because the jury found them innocent of fraud they "could not have concealed a misrepresentation" from the appellees, and hence the Teeters v. Curry rule, 518 SW2d 512 (Sup. Ct. 1974), is not applicable. We do not agree, for reasons heretofore expounded. The issue is not whether these appellants concealed salient facts, but whether the appellees in the exercise of proper judgment discovered or should have discovered the cause of their problems.

The remaining issues presented by Hermitage and Osborne are duplicative of those presented by AOSHPI and need not be further discussed.

We find all of the issues to be without merit and therefore affirm the judgment. In view of this, we pretermitt the issues propounded by the appellees.

The costs are assessed to the appellants.

/s/ William H. Inman  
William H. Inman,  
Special Judge

CONCUR:

/s/ Henry F. Todd  
Henry F. Todd, Presiding Judge

/s/ Ben H. Cantrell  
Ben H. Cantrell, Judge.

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No. 96-663

In the  
**Supreme Court of the United States**

October Term, 1996

MARVIN KLEHR AND MARY KLEHR

*Petitioners,*

v.

A.O. SMITH CORPORATION AND  
A.O. SMITH HARVESTORE PRODUCTS, INC.,*Respondents.*

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

**PETITIONERS' BRIEF ON THE MERITS**

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### **QUESTIONS PRESENTED FOR REVIEW**

Petitioners, Marvin and Mary Klehr, are Minnesota dairy farmers who appeal from a summary judgment, dismissing their RICO claim on statute of limitations grounds. They raise two issues on appeal:

1. Does the statute of limitations bar Petitioners' civil RICO claim where Respondents continued to commit predicate acts and the Petitioners suffered additional, continuous and accumulating injuries to their business and property within four years of commencing suit?
2. Did Respondents' fraudulent, self-concealing conduct and acts of fraudulent concealment suspend the statute of limitations on Petitioners' civil RICO claim?

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## CITATION OF THE OFFICIAL REPORT OF THE UNDERLYING OPINIONS

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 87 F.3d 231 (8th Cir. 1996). The opinion of the United States District Court for the District of Minnesota is reported at 875 F. Supp. 1342 (D. Minn. 1995).

## STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment by denying the Petition for Rehearing on July 29, 1996. Petitioners filed their Petition for Certiorari on October 24, 1996. This Court granted the Petition on January 10, 1997. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AT ISSUE

18 U.S.C. §1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"Racketeering activity" is defined in 18 U.S.C. § 1961(1)(B) to include "any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . ."

"Pattern of racketeering activity" is defined in 18 U.S.C. § 1961(5) as "requir[ing] at least two acts of racketeering activity, . . . the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

18 U.S.C. § 1964(c) provides:

any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

### STATEMENT OF THE CASE AND FACTS

#### **I. A.O. Smith Begins to Manufacture the Harvestore.**

In 1949, A.O. Smith ("Smith") began to manufacture and sell a new "Harvestore" silo which, it claimed, combined superior feed with labor saving hardware that automatically unloaded and delivered the feed to livestock. *See, e.g.*, Appendix/Lodging ("App.") 714-16; 823-24; 719-20; 740-42. Smith and its wholly-owned subsidiary, A.O. Smith Harvestore Products, Inc. (collectively, hereinafter "AOSHPI"), marketed and manufactured this "revolutionary" Harvestore silo through authorized dealer/agents.

AOSHPI claimed that the Harvestore minimized spoilage by preventing oxygen from coming into contact with stored feed. *See, e.g.*, App. 715-16. Although it had not discovered how to retard feed spoilage in silos, AOSHPI manufactured a silo which *appeared* to "seal" stored feed from the outside air, modeling the Harvestore after the glass canning jars with which farmers were familiar. App. 668. In sales

presentations, AOSHPI highlighted the silo's "marine-type" doors and "hatches" with gaskets. App. 715; 772; 781; 668. AOSHPI's promotion of the "oxygen-limiting" idea did not stop at mere appearances, however. In advertisements it published for more than forty years, AOSHPI repeatedly told farmers that the Harvestore would prevent air from coming into contact with the feed. *See* App. 774; 749-75.

#### **II. Why Harvestores Don't Work.**

##### **A. A Closed System Must "Breathe."**

AOSHPI's "revolutionary" idea did not work in practice because a silo cannot be sealed. First, a sealed container must have a way to exchange gas or "breathe" in order to equalize the pressure of the gas inside as it expands and contracts with changes in air temperature. App. 823-24; 774; 659. Second, farmers must open silos at the bottom several times every day to remove feed for cattle and open them at the top, periodically, to fill them. No one has solved the problem of "sealing" a silo under these conditions. *Cf.* App. 658-59. But AOSHPI claimed it had. App. 781.

AOSHPI told farmers that it solved the first problem by using a lung-like "breather" bag system. App. 686; 781. The breather bags hang at the top of the silo and, theoretically, expand and contract to accommodate head space gas expansion and contraction due to daily temperature changes. *Id.* AOSHPI claimed that any oxygen entering the silo would be contained in the breather bags and would not contact the feed. App. 780-81.

AOSHPI told farmers it had also solved the problem of air leakage during periodic filling and daily feeding. It claimed that air entering the silo during filling and feed-out would be converted in the fermentation process to a harmless gas within a short time. App. 812; 781.



## **B. Harvestore Research Demonstrates that AOSHPI's Claims are False.**

AOSHPI knew from its own research studies that no science stood behind its claims. Its research had not only failed to prove that Harvestores actually worked, but repeatedly demonstrated that AOSHPI's claims were false. AOSHPI's scientists confirmed that when a farmer opened the unloader door to remove feed for his livestock, the breather bags in the silo collapsed, causing air to rush into the silo. App. 916; 899-900; 890. Negative pressure and the pumping action of the unloader then forced oxygen into the feed mass itself instead of merely exposing the surface feed to air as in a conventional silo. App. 916-18; 957-59. *See Estate of Korf v. A.O. Smith Harvestore Prods., Inc.*, 917 F.2d 480, 482 (10th Cir. 1990).

AOSHPI knew that exposure to oxygen levels greater than 2% causes heat damage and spoilage to feed and reduces its nutritional value. App. 892. In a Harvestore, oxygen contact with the feed exceeds 20% within minutes after the silo is opened for feeding and never returns to less than 6% during the daytime. App. 899-900. *See also* App. 907 (oxygen reaches feed at every feed-out); App. 914 (oxygen reaches feed 96% of days in last four months of storage). Thus, AOSHPI's scientists observed: "Filling and feed out operations present a structure atmosphere control problem." App. 900.

Despite extensive testing over many years, AOSHPI never solved its "structure atmosphere control problem":

We in R&D do not have any good information on what percentage of operating Harvestore systems might be judged unsatisfactory with respect to oxygen exposure.

App. 922. *See also* App. 875-77; 921; 926 ("There are great information gaps in our knowledge."). By 1982, AOSHPI's engineers still did not know how to make "the Harvestore system" work. App. 958

Yet, during the forty years that AOSHPI conducted its internal research, it continued to market the Harvestore silos as oxygen-free/oxygen limiting without significant design changes. Knowing that the oxygen which infiltrated at each feedout could cause heat damage to silage, it told farmers that its engineers had designed a system that "did not allow the structure to fill with oxygen" during unloading. App. 820. AOSHPI also continued to tell farmers that the "Harvestore system protects stored feeds from oxygen" and that "[t]he Harvestore . . . system prevents oxygen from coming into contact with the feed." App. 774, 715; 780. *See also* App. 488-92.

## **III. AOSHPI Conceals the Fraud.**

In order to continue to sell Harvestores, AOSHPI needed to prevent farmers from suspecting that their Harvestore claims were false. Their concealment effort was a major component of their overall marketing strategy.

### **A. AOSHPI Told Farmers That Damaged Feed Was "Good Harvestore Feed."**

The most ingenious idea that AOSHPI devised to avoid detection of its nationwide fraud on farmers was an advertising strategy which capitalized on the Harvestore's production of spoiled feed. As AOSHPI knew from its years of research, feed which is warm to the touch, dark in color and smells of molasses is heat-damaged. App. 162, ¶2(A); 166-67, ¶7. Heat damage occurs when feed is exposed to oxygen. *Id.* Heating of feed destroys the nutritional value of the stored

feed, binding the proteins and carbohydrates and making them undigestible and nutritionally unavailable to the cow. *Id.* When heat-bound protein is fed to a cow, the cow is unable to digest the protein and receives a deficient diet. App. 162, ¶2(A). It will experience weight loss, a drop in milk production, a drop in reproductive performance and a reduction in overall health. App. 158, ¶9. See also *Lollar v. A.O. Smith Harvestore Prods., Inc.*, 795 S.W.2d 441, 444 (Mo. Ct. App. 1990).

AOSHPI ran a series of "scratch and sniff" advertisements which employed a burnt molasses odor to characterize the smell of "good" Harvestore feed. App. 804. This odor actually describes feed damaged by excessive oxidation. App. 162, ¶2(A). See also App. 659. AOSHPI also ran ads which advised farmers that they should expect warm feed and that the warm feed was particularly good for cows. App. 172, ¶4. By telling farmers that they should expect warm, dark feed that smelled of molasses, AOSHPI prevented farmers from suspecting that there was anything wrong with the silo when they observed these characteristics in their Harvestore feed.

**B. Harvestore Construction Made Detection of the Scheme Difficult.**

**1. Farmers cannot examine the inside of the silo while it is in use.**

The basic premise of a Harvestore is that it is a "sealed" system. Except for a small opening at the top of the silo where the farmer automatically blows in feed and a small opening at the bottom where the chain unloader protrudes, it contains no doors or windows. App. 772. If a farmer were to climb the silo and look into the small opening at its top, it is unlikely that he would detect any problem with the feed since AOSHPI had taught him that heat damaged feed was "good

Harvestore feed." App. 772; 177, ¶11. It would be equally difficult for a farmer to detect any problem with the feed by looking into the Harvestore at the bottom. The silo's "access" panel consists of a small plate bolted onto the Harvestore just above the small opening for the unloader chain. AOSHPI put a sign over the plate which warns:

**DANGER  
DO NOT ENTER  
NOT ENOUGH OXYGEN  
TO SUPPORT LIFE**

See App. 655 (Picture); 654. Even were a farmer to unbolt the access door, all he would see is a solid three-four foot deep wall of "good [heat-damaged] Harvestore feed." App. 669. This silage is under tons of pressure and is "extremely hard to chop even with an ax." App. 658. As described below, any molds grew in the interior feed dome deep within the silo.

**2. The unloader grinds signs of mold into the feed.**

One of the "revolutionary" features of the Harvestore is that the silo unloads from the bottom rather than the top like a conventional silo. See, e.g., App. 686; 720. Bottom unloading of forage feeds is possible only because the Harvestore is sold with a chain unloader similar to mining machines used to "chew coal from veins deep beneath the earth." App. 720. This unloader can remove feed that is not "free-flowing" and is under tremendous pressure from the feed stack above. App. 824; 658. The chain unloader "chews" through the feed, blending the layers as the feed comes out of the silo. App. 824; 689.

Exposure to oxygen causes mold growth as well as heat damage to feed. Vast amounts of mold grow primarily in the "dome" in the bottom of the feed stack created by the action of the chain unloader App. 669. The chain unloader systematically chops this mold into the feed as the feed is discharged so that it is not readily discernable to the farmer. App. 177, ¶11.

### **C. AOSHPI Invited the Farmers' Reliance.**

AOSHPI provided Harvestore owners with a deluge of post-sale advertising calculated to build the farmers' trust in the company and assure him that: (1) AOSHPI was an established business and could be trusted; (2) years of research, both internal and "independent," confirmed AOSHPI's claims; and (3) many, many "smart" and successful farmers have put Harvestore principles into practice through every day use of the silos. App. 808-809; 730-32.

AOSHPI's entire "after sale" campaign was calculated to prevent farmers from learning that the feed from their Harvestores was no better than the feed from ordinary silos and could actually harm the farmers' cattle and business.

#### **1. AOSHPI Claims Harvestores Are Backed By Years of Research.**

AOSHPI told farmers that the Harvestore was backed by years of research and that the research would be disclosed to the farmer. App. 657 (research findings are "passed along to . . . dealer" who, in turn, makes them "available to you"); App. 782 (results are "available"); App. 779 (Harvestore based on "basic, proven principles"); App. 809 (continuing research at more than 60 colleges and universities). In order to add credibility to the research, they hired "independent" experts, including Professor George Marx, to publish

educational information about feed storage. Professor Marx gave live presentations regarding Harvestore storage to dairymen. App. 477-81. AOSHPI never disclosed to Dr. Marx, however, any of its own internal research which demonstrated that it had been unable to seal the silo. App. 481-83. Thus, AOSHPI used its long history and years of research to cultivate farmer trust and confidence, but rather than making its research available to the farmers, selectively published the good parts of the studies and buried the bad. App. 492-93; 730; 705-706. Farmers were led to conclude that there was no question that the silos performed as represented.

#### **2. AOSHPI claimed that Harvestore farmers were "smart" and "happy" farmers.**

Not only did Harvestore advertisements invite trust and confidence in AOSHPI, they suggested that there were many "smart" Harvestore farmers who were happy and satisfied with their silos. App. 807 ("60,000 . . . structures in use around the world."). Harvestore magazines contained numerous success stories and testimonials. App. 812-13; 51-60; 709-11. AOSHPI's marketing materials created a general belief in the dairy industry that Harvestores were the best available feed storage system. App. 176, ¶9. As a result, AOSHPI sold tens of thousands of Harvestores throughout the country. App. 807. The fact that thousands of blue Harvestore silos dotted the countryside suggested to farmers that the basic design of the Harvestore was sound.

#### **3. Harvestore "experts" provided farmers with advice and help.**

Emphasizing its superior knowledge of the scientific aspects of farming and feed storage, AOSHPI "educated"



farmers about the principles which it asserted "proved" that Harvestores worked. It provided farmers with countless articles and seminars. *See, e.g.*, App. 730; 676-77; 745; 467-68. It counseled complete farmer reliance on its salesmen to assist with all aspects of farm management. App. 690-91 (The Harvestore dealer "doesn't figure his job is done when a Harvestore is sold—he realizes that a sale marks the start of his real job. . . . Counseling owners on proper farm management practices is an important part of the Harvestore sales representative's job"); App. 717; 657; 721; 745; 768-69 (your "Partner in Progress—Count on him"). Farmers were told that Harvestore dealers would provide: "Counseling and assistance in areas such as feedlot planning, feedroom layout and ration formulation." App. 745. Thus, Smith and AOSHPI advised:

Your local Harvestore representative is more than a salesman . . . He's been through an intensive training program to learn the latest in crop management . . . animal nutrition . . . farmstead planning . . . agriculture finance and other key farm management areas. Add to all that his special knowledge of crop and livestock conditions in your area and you can see why he's a good man to know. . . . Your Harvestore man is no theoretical dreamer . . . the information he'll give you is based on the experiences of thousands of successful Harvestore farmers around the world. And, backing him up is the world's largest manufacturer of feed processing and automation equipment . . . with more than a quarter century of helping farmers boost profits.

App. 721 ("Meet your Agribusiness Answer Man"). *See also* App. 792.

AOSHPI's "expert" representatives contacted farmers periodically after the silo sale. If the farmer told the Harvestore salesman about a farm problem, the salesman would tell farmers that the problem was attributable to silo maintenance or farm mismanagement. App. 461-64. The salesmen were trained to advise farmers that any mold they saw in feed was normal and would not harm the cows. App. 470-71.

After constant exposure to AOSHPI's post-sale messages, the farmer was highly unlikely to suspect that any problems he was experiencing on his farm were caused by his revolutionary Harvestore silo. It was far more likely that a farmer would conclude that if there was a problem, its source lay in his own practices. *See, e.g.*, App. 484-85 (Harvestore dealer describes how he blamed himself for his own farm problems).

#### **D. AOSHPI Suppressed Complaints and Prevented the Dissemination of Research Information.**

Despite AOSHPI's concealment of the fraud, problems with the silos surfaced in California and farmers began to sue. App. 486-92. AOSHPI's internal research studies figured prominently in these suits. App. 873-74. Rather than cease manufacturing the silos, however, AOSHPI simply stopped selling in California. App. 492-94.

It then adopted internal procedures to prevent leakage of internal research information to the public in future lawsuits. As part of this scheme, James N. Johnson, Smith's corporate counsel and vice president, laid the groundwork to falsely claim the attorney-client privilege:

In many respects, these memos formed every bit as much damning evidence as did any of the

advertisements or promotional pieces upon which Plaintiffs sought to rely.

\* \* \*

. . . [A]nd when it appears that its mechanical problems are yet far from solution, I suggest that the writings with respect to such problems be kept to an absolute minimum and, to the degree that they appear to be necessary, they should be addressed to the Law Department, . . . so that each memo will receive, . . . the mantel of privileged communication and, thus, be secure from seizure by subpoena in discovery proceedings if additional litigation should ensue.

App. 873-74 (emphasis in original). As a result of AOSHPI's systematic concealment of documentary evidence, there is no way of knowing what additional damaging research information has been or still is in AOSHPI's possession.

#### IV. Marvin and Mary Klehr Purchase their Harvestore.

Marvin and Mary Klehr are Minnesota farmers, who first became ensnared in AOSHPI's Harvestore scheme in 1974. Marvin grew up on the family's farm and attended school through the 10th grade. App. 196. In 1974, the 29 year-old Klehr had had full responsibility for the family farm for one year.

That year, Richard Deutsch, an employee of MVBA Harvestores Systems ("MVBA") an authorized AOSHPI dealer, gave the Klehrs printed information about the purchase

of a Harvestore silo.<sup>1</sup> App. 219. Deutsch told Klehr, and the written material and films Deutsch gave him confirmed, that the silos were "oxygen free/oxygen limiting" because the breather bag system kept oxygen from coming into contact with feed. Klehr was told that good Harvestore feed would be warm and dark and smell of molasses. App. 171-72; ¶¶ 2, 3, 4; 420-21. Based on these oral representations and printed material, the Klehrs bought a 25 foot x 80 foot Harvestore silo for \$64,000 on July 15, 1974. App. 171, ¶2; 455-57; 649.

Klehr began using the silo during the summer of 1975 to store alfalfa haylage. App. 172, ¶4; 274. Each time he filled it, the feed turned brown and warm and smelled like molasses. App. 172, ¶4. Deutsch visited Klehr on his farm, examined the feed and confirmed that it was "good" Harvestore feed. App. 269-70.

Klehr fed the Harvestore feed to his cows without seeing any problems until the summer of 1976. During that summer, just after he had used all of the stored silage from 1975, Klehr noticed a few small chunks of mold in the feed. App. 172-73, ¶ 4. When questioned about the mold, Deutsch explained that

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<sup>1</sup>Klehr was also aware of Harvestores because his father bought a small Harvestore in 1955, which he used primarily for grains. Klehr had not experienced problems with this small (17x40) silo because the smaller silos do not always damage feed, having less head space air to accommodate. App. 165-67. In 1980, AOSHPI research concluded: "It has been indicated in the past that unloader air intake to forage structures may be more of a problem with the larger [greater than 20 foot] diameters." App. 925. In addition, some Harvestores, like Klehrs' smaller unit, use an auger to unload free-flowing grains instead of a chain unloader which is used for forage feeds. Grain silos do not form a dome in the feed like the forage silos, making them less susceptible to oxygen degradation. Compare App. 669 with App. 670. As AOSHPI noted: "[T]here is a significant quantity of oxygen input due to unloading with a chain unloader in alfalfa haylage." App. 923. The Klehrs' 1974 Harvestore was a 25 foot diameter structure which used a chain unloader for alfalfa haylage.

Klehr should expect to see mold in the feed periodically due to the air that was blown into the silo during fillings. *Id.* App. 173, ¶ 4. Deutsch told him that this small amount of mold would not harm the cattle. *Id.* Klehr accepted this explanation because he had seen the same spoilage in other storage systems. *Id.* He knew that the Harvestore would keep spoilage to a "minimum," but would not eliminate it altogether. App. 802. After that, he was unconcerned when he would see occasional mold in the feed because the silo contained feed from several fillings. App. 276-77; 173, ¶4; 261-62.

In the spring of 1977, and every subsequent year, at the time the silo was nearing empty, Klehr would be required to discard a small amount of molded feed at the end of the feed stack. App. 173, ¶4; 276-77. When he asked Deutsch about this mold, Deutsch again explained that this was the top layer of feed which had reached the bottom. App. 173, ¶4; 470-71. Klehr believed the loss of this feed was insignificant given the large size of the silo. App. 173, ¶4; 751; 308.

The existence of mold at these times did not lead Klehr to suspect that his "good Harvestore feed" was heat-damaged and would harm his cows. As noted above, Deutsch and another MVBA representative, Ben Johannes, examined the feed periodically. App. 474-75; 295. They sometimes observed that it was chopped too dry or too coarse, too short or too wet, but always told Klehr that it was generally satisfactory Harvestore feed. App. 295-98. In fact, the Harvestore salesmen told Klehr that Harvestores only generate bad feed when there is a leak in the silo or farm mismanagement. App. 175-76, ¶8; 461-64.

From the time he purchased his silo, AOSHPI mailed Klehr the *Harvestore Farmer/Harvestore System Farming* magazine. App. 176, ¶ 9; 718-21. Every issue contained testimonials from successful Harvestore farmers and numerous advertisements and educational articles regarding Harvestore

use. Klehr also subscribed to *Hoard's Dairyman*, a magazine which regularly featured promotions and advertisements for AOSHPI silos. App. 810. These materials confirmed Klehr's belief that he had purchased the "Cadillac" of silos and that any problem on his farm must be due to his own farm management or other causes.<sup>2</sup> *Id.* App. 722-45; 771. Accordingly, he continued to use the silo on a daily basis.

In 1982, the Harvestore discharged a significant amount of obviously spoiled feed at the end of the year. App. 290; App. 173-74, ¶ 5. Deutsch inspected the feed and told Klehr that whatever had caused the problem would be fixed. App. 292-93. MVBA repairmen came to the farm, inspected the silo, replaced a broken breather bag and "resealed" the silo. App. 173-74, ¶ 5. MVBA's "repair" of the silo reinforced Marvin Klehr's belief that it was working properly. *Id.*

Sporadically, through the years, Klehr's cows experienced a number of apparently unrelated health problems. App. 174-75, ¶ 6; 169, ¶ 8. Although milk production increased for the first two years after the Klehrs' purchase of the Harvestore, these herd health problems negatively affected milk production in later years. App. 174-75, ¶¶ 6, 7. Klehr attempted to remedy what he believed were the various causes of these problems. App. 168-70, ¶ 8.

When Klehr asked experts, including veterinarians and nutritionists, about the source of a particular problem, they

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<sup>2</sup>Indeed, AOSHPI warned farmers not to relate their farm's success or failure to their Harvestore: "Buyer acknowledges that farming results are very much the product of individual effort combined with various climatic, growing and feeding conditions and therefore he recognizes that any advertisements, brochures, and other written statements which he may have read, including any farm profit plan with may have been shown to him, as well as any oral statement which may have been made to him, concerning the potential of the Harvestore Structure and allied products, are not guarantees and he has not relied upon them as such." App. 650.



recommended specific treatments. App. 174-75, ¶ 6; 337-39. None of the experts ever suggested that any or all of these problems were caused by heat-damaged feed. All of the problems the Klehrs' herd experienced are common on dairy farms and can be caused by numerous factors. App. 163, ¶ 2(E); 168-70, ¶ 8; 174-75, ¶ 6. Milk production, in particular, can be affected by many different factors. App. 168, ¶ 8. The Klehrs' problems were not obviously related, either in character or temporal proximity, to bad feed or to the Klehrs' purchase of a Harvestore. App. 168-70, ¶ 8. Neither they nor their advisors ever suspected that these diverse problems had a single common cause or that the heat-damaged feed from the Harvestore was slowly and insidiously poisoning their herd.

#### V. Marvin Klehr Discovers That the Harvestore Has Been Poisoning His Cattle.

Klehr's first suspicion that spoiled feed was injuring his cows came when he read about a jury verdict against AOSHPI in a February 1991 newspaper article. *See Kronebusch v. MVBA Harvestore System*, 488 N.W.2d 490 (Minn. Ct. App. 1992). He asked a veterinarian and nutritionist from the University of Minnesota, Dr. William Olson, to visit the farm in the spring, at the time when the Harvestore feed was likely to contain the occasional molds which Deutsch had told him to expect at the end of the feed stack. App. 176-77, ¶ 10.

Before Olson arrived, Klehr unbolted the access panel above the unloader and chopped through a 3½ - 4 foot wall of silage with a four-foot long ice chisel so he would be able to see inside the 15 to 20-foot high feed dome. App. 315. After 1½ - 2 hours of chopping he finally dug a hole large enough to see inside. *Id.* What he saw astonished him: "There was mold hanging all over the silage. . . . There was a spot up there about the size of a good beach ball that was just solid gold." App. 316-17; 177, ¶ 10. Although the feed was covered with

mold inside the silo, both Klehr and Dr. Olson noticed that the "churning" action of the unloader caused the mold to disappear when it emerged from the unloader door. App. 177, ¶ 11. Upon seeing the extent of the mold inside the silo, Klehr suddenly realized that the "good Harvestore feed" he had fed his cattle for 15 years was actually damaged feed. App. 177-78, ¶¶ 11, 12.

Each year, this heat-damaged feed caused the Klehrs new injuries as their farming operation slowly deteriorated. App. 165-66, ¶ 6.<sup>3</sup> After he stopped feeding this spoiled feed to his cattle, herd health and milk production improved dramatically. App. 178, ¶ 12; 982.

#### VI. Statement Of The Case

Marvin and Mary Klehr commenced a Minnesota state court action against Smith, AOSHPI and MVBA Harvestore within a few months after Klehr discovered the Harvestore fraud. During the course of that action, AOSHPI moved to dismiss the case on statute of limitations grounds. The state court judge denied the motion holding that "there were genuine issues of material fact surrounding the timing and reasonableness of the discovery of the fraud and the timing of the discovery of causation and fraudulent concealment of the grounds for the remaining claims." Record ("R.") 129, Affidavit and Exhibits of Charles A. Bird, Exhibit UU.

The Klehrs voluntarily dismissed their state court action and commenced this action on August 27, 1993, asserting claims against AOSHPI pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO" or "the Act"), 18

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<sup>3</sup>Dr. Michael Behr compared the Klehr farm's economic performance with that of comparable operations and concluded that Klehr's damages for lost milk production between 1974 and 1993 totaled \$1,812,330. App. 960, 963.

U.S.C. §§ 1961-68. AOSHPI again moved for summary judgment on statute of limitations grounds.

#### A. The District Court's Decision

The district court found that the Klehrs did not know that the Harvestore was damaging the feed until April 1991, citing Marvin Klehr's testimony regarding his inability to link the damage to his farm operation to the Harvestore:

At the end of the year, I had an enterprise of hogs, milk, crops, and who knows whatever else. It was all thrown into one kitty, and I never once thought it was because of my Harvestore not giving me the profit or not doing what it was supposed to. Could have been the bad hogs, or bad weather, bad crops . . . I farmed long enough that you cannot project ahead a whole year what you think you are going to get, because it never comes out that way. You take what the good Lord gives you.

875 F. Supp. at 1348. Yet, it held that the Klehrs "should have discovered, through the exercise of reasonable diligence, any fraud committed by Defendants long before 1987." *Id.* at 1350. It based its opinion on the fact that the connection between the intermittent instances of mold in the feed and the herd's health problems "should have been apparent to Klehr by the early 1980s." *Id.* at 1349. It acknowledged that feed and animal health experts had failed to link the herd's health problems to the Harvestore, but decided that *Klehr* should have made the connection. *Id.* at 1350. Thus, the court said Klehr was negligent, first in failing to realize there was a connection between the occasional mold in the feed and his

herd's health problems and second, in failing to investigate that connection to discover the fraud.<sup>4</sup> *Id.*

The court also rejected any tolling of the statute of limitations based on fraudulent concealment on the grounds that the Klehrs "had only to look at the feed coming from the silo and observe the health of their herd" to discover the fraud. *Id.* at 1351. The court also held that when AOSHPI told Klehr that he should expect occasional mold in the feed; that he should expect the feed to be warm, dark and smell of molasses; that Klehr's feed was "good Harvestore feed," that his silo had been "resealed"; and that research confirmed that the silo worked; it was not engaged in any affirmative acts of concealment. *Id.* at 1352, n.6.

#### B. The Eighth Circuit's Decision

The Eighth Circuit affirmed the district court's summary judgment against the Klehrs based on the following "injury plus pattern discovery" accrual standard:

An action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.

87 F.3d at 238 (internal quotation marks and citation omitted). Thus, the court held, "it is incumbent upon the Klehrs to show that it would not have been reasonable to discover the existence, source, and pattern of their injury by August 27, 1989."

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<sup>4</sup>Although the court discussed these facts in connection with the Klehrs' common-law fraud claim, it appears to have applied that discussion to the RICO claim. *See id.* at 1352.

Noting that the Klehrs "never asked [veterinary and nutrition] consultants whether the Harvestore could have been the source of the problems" (87 F.3d at 234), the court found that they had not exercised due diligence. *Id.* at 239. Citing its analysis of the common law fraud claims, the court agreed with the district court that the fact that there was occasional mold in the feed (even if explained away by the Harvestore representative) and the fact that the Klehrs had herd health problems and decreased milk production (although Klehr's advisors noted no connection between these problems and bad feed), meant that "the Klehrs were on notice of a possible cause of action for fraud and were required [as a matter of law] to conduct a reasonably diligent investigation" of the silo as a possible cause of the problems. *Id.* at 236.

The court rejected the Klehrs' claim for continuing damage under the separate accrual rule on the grounds that later predicate acts must cause "independent" injuries to create a separate claim. Here, the court held, "the injuries were the same type, flow from the same source, and are part of one cognizable pattern of conduct." *Id.* at 239. Finally, the court held that the Klehrs' negligence "precluded" application of the equitable tolling doctrine. *Id.* at n.11.

This Court granted certiorari in order to address the RICO claims. As shown below, the courts below erred in both their construction of the law and their application of the law to the facts. Accordingly, the judgment should be reversed and the case remanded for trial.

### SUMMARY OF ARGUMENT

The Eighth Circuit applied an erroneous "injury plus pattern discovery" accrual rule to determine whether the statute of limitations had run on the Klehrs' RICO claims. This Court should reject that rule, and adopt the "last predicate act" accrual rule used for RICO criminal

prosecutions, in order to further the policy objectives embodied in RICO and simplify RICO litigation. Under that rule, the Klehrs' claim did not accrue until AOSHPI committed the last predicate act in the pattern. *See, e.g., United States v. Torres Lopez*, 851 F.2d 520, 525 (1st Cir. 1988), *cert. denied*, 489 U.S. 1021 (1989). Because the Klehrs submitted evidence establishing a predicate act in the pattern within the limitations period, their claim is not time-barred.

Even if the Eighth Circuit's "injury plus pattern discovery" accrual rule applied, the courts below erred by (1) placing the burden of proving that their claims were *not* time-barred on the Klehrs and (2) resolving disputed issues of material fact against them. AOSHPI failed to carry the burden of establishing its statute of limitation defense. *See Smith v. Duff & Phelps, Inc.*, 5 F.3d 488, 492 n.9 (11th Cir. 1993). In any event, because the Klehrs submitted evidence establishing that they were not negligent in having failed to discover the RICO injury and pattern within the limitations period, AOSHPI was not entitled to judgment "as a matter of law" on its statute of limitations affirmative defense. *See United States v. Diebold, Inc.*, 369 U.S. 654 (1962). At the very least, the Klehrs are entitled to try their separately accrued RICO claims for recovery of the damages caused by predicate acts committed by AOSHPI during the four years preceding commencement of the action. *See State Farm Mutual Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring).

Finally, the Klehrs established that the accrual of their RICO claim was tolled by AOSHPI's acts of fraudulent concealment. *See Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946); *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 852 (7th Cir. 1996). Accordingly, this Court should reverse and remand for trial.



## **ARGUMENT**

### **I. THIS COURT REVIEWS THE ENTRY OF SUMMARY JUDGMENT DE NOVO.**

Under Fed. R. Civ. P. 56(c), summary judgment may not be granted unless "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). This Court reviews the lower court's determinations of law *de novo*. See *Elder v. Holloway*, 510 U.S. 510, \_\_\_, 114 S. Ct. 1019, 1023 (1994).

### **II. THE COURT APPLIED AN INCORRECT ACCRUAL RULE: THE KLEHRS' CLAIM IS NOT BARRED BECAUSE AOSHPI CONTINUED TO COMMIT PREDICATE ACTS WITHIN THE LIMITATIONS PERIOD.**

In this case, the Klehrs seek to recover their damages based on 18 U.S.C. § 1964(c):<sup>3</sup>

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

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<sup>3</sup>Klehres' § 1964(c) claim is based on AOSHPI's violations of 18 U.S.C. § 1962(a) and (c). To the extent § 1962(a) claims are governed by a rule of accrual different from § 1962(c) claims, the Klehrs do not raise that issue in this appeal.

RICO contains no limitations period time-barring either civil or criminal actions brought pursuant to the Act. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 146, 155-56 (1987) ("*Malley-Duff*"). However, this Court held in *Malley-Duff* that a four-year limitations period applies. *Id.* at 156. The Court expressly left open "the appropriate time of accrual for a [civil] RICO claim." *Id.* at 156-57.<sup>6</sup>

The Eighth Circuit dismissed the Klehrs' RICO claim based on the "injury plus pattern discovery" accrual rule which ties accrual to the date when plaintiff "discovers or should have discovered, both the existence and source of his injury and that the injury is part of a pattern." 87 F.3d at 238. Because this accrual rule is inconsistent with civil RICO's language and underlying purposes, this Court should instead hold that the accrual rule currently applied to criminal RICO cases also applies to civil RICO actions. Under criminal RICO, the statute of limitations runs from the last predicate act in the pattern. See, e.g., *Torres Lopez*, 851 F.2d at 525. Under the last predicate act rule, the Klehrs' claim is timely.

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<sup>6</sup>In the decade since this Court decided *Malley-Duff*, the Courts of Appeals have adopted a number of accrual rules. See generally Mary S. Humes, Note, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399 (1990) (surveying the rules applied by the courts of appeals); Edwin Scott Hackenberg, Comment, *All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of Agency Holding Corp. v. Malley-Duff*, 48 La. L. Rev. 1411 (1988) (same); see also *Grimmett v. Brown*, 75 F.3d 506, 510-12 (9th Cir. 1996) (same), cert. dismissed, 117 S. Ct. 759 (1997). These courts also apply sub-rules regarding "separate accrual" of actions (see, e.g., *Ammann*, 828 F.2d at 5 (Kennedy, J., concurring)), and equitable tolling. See, e.g., *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.2d 339, 347 (2d Cir. 1994); *Davis v. Grusemeyer*, 996 F.2d 617, 624 & n.12 (3d Cir. 1993); see also *Rodriguez v. Banco Central*, 917 F.2d 664, 667-68 (1st Cir. 1991).

**A. The Court Should Choose a Uniform Accrual Rule Which Promotes RICO's Purposes and Reduces Litigation.**

This Court's choice of a uniform limitations period in *Malley-Duff* reflected two important goals: (a) reduction of "intolerable 'uncertainty and time-consuming litigation,'" (*Malley-Duff*, 483 U.S. at 149-50 (quoting *Wilson v. Garcia*, 471 U.S. 261 at 272)), and (b) furtherance of the "design [of RICO's civil damages provision] to fill prosecutorial gaps." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 (1985). These two goals should likewise guide the Court's choice of a civil RICO accrual rule. The accrual rule selected should simplify RICO litigation, balancing the plaintiff's right to recover and the practical difficulties of establishing a violation, against the practical difficulties of hearing the claim. See generally, *Wilson*, 471 U.S. at 268. The rule should also promote the statutory goals embodied in the Act, rather than "frustrate or significantly interfere with the federal policies" underlying RICO. *Reed v. United Transp. Union*, 488 U.S. 319, 327 (1989). As shown below, the criminal "last predicate act" accrual rule is an easily applied, uniform rule of accrual which reflects RICO's unique elements and furthers its remedial purposes.

**B. The Last Predicate Act Rule Promotes the Purposes Underlying Civil RICO.**

**1. The last predicate act rule enhances civil RICO's role as a supplement to RICO's criminal enforcement provisions.**

Case law decided under criminal RICO provides an appropriate source for selection of an accrual rule because it

employs RICO concepts.<sup>7</sup> Moreover, reference to criminal RICO analysis is consistent with RICO's focus on criminal conduct. See *H.J., Inc.*, 492 U.S. at 245 ("[o]rganized crime was without a doubt Congress' major target" and is the focus of the legislative history); *id.* at 248 ("The occasion for Congress' action was the perceived need to combat organized crime."). Congress enacted RICO primarily to target criminal behavior that was a "regular way of doing business." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989); see *id.* at 242 n.4; Craig M. Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 838-45 (1980) (reviewing legislative history). The "pattern" and "enterprise" elements focus the Act on crime "organizations" and criminal business enterprises that are able to flourish as a result of prolonged patterns of integrated criminal activity. See *Sedima*, 473 U.S. at 526 (Powell, J., dissenting).

Courts which have balanced the competing interests of RICO criminal defendants with the policies underlying enforcement of the act itself uniformly hold that the criminal

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<sup>7</sup>This Court declined to "borrow" a statute of limitations period from criminal RICO because the criminal statute of limitations, having not been supplied by Congress in drafting the Act, did not "reflect any congressional balancing of the competing equities unique to civil RICO actions." *Malley-Duff*, 483 U.S. at 156. Since the Clayton Act statute of limitations could be said to reflect some measure of Congressional balancing, this Court borrowed it for RICO. Congress did not, however, provide an accrual rule in the Clayton Act. Thus, the Clayton Act cannot serve as a source for discovery of Congress's intentions regarding accrual of RICO claims. See 15 U.S.C. § 15b. No federal court of appeals has adopted the Clayton Act accrual rule for RICO claims because RICO's unique multi-act pattern requirement is not shared by the Clayton Act (which targets harm to competition induced by force rather than fraud). See *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 153 (8th Cir. 1991). Accordingly, there is no reasoned basis for adopting the Clayton Act accrual rule over the criminal RICO accrual rule.

statute of limitations for violations of § 1962(c) begins to run when the last illegal predicate act in the pattern is committed. Glenn Beard, et al., *Racketeer Influenced and Corrupt Organizations*, 33 Am. Crim. L. Rev. 929, 957 (1996); see, e.g., *United States v. Darden*, 70 F.3d 1507, 1525 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1449 (1996); *United States v. Starrett*, 55 F.3d 1525, 1544-45 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1335 (1996); *Torres Lopez*, 851 F.2d at 525; *United States v. Persico*, 832 F.2d 705, 714 (2d Cir.), *cert. denied*, 486 U.S. 1022 (1987); *United States v. Bethea*, 672 F.2d 407, 419 (5th Cir. 1982); see also *United States v. Vogt*, 910 F.2d 1184, 1196 (4th Cir.) (dictum), *cert. denied*, 498 U.S. 1083 (1990). The court in *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.) (mem.), *cert. dismissed*, 439 U.S. 801 (1978), explained:

The Act provides an example of a continuing offense for purposes of computing the time at which the statute of limitations begins to run. The "nature of the crime . . . is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie v. United States*, 397 U.S. 112, 115 (1970). The language of the Act, which makes a pattern of conduct the essence of the crime, "clearly contemplates a prolonged course of conduct." *Id.* at 120. Like the statute of limitations for conspiracies, which runs from the date of the last overt act, *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957), the statute of limitations for violations of the Act runs from the date of the last alleged act of racketeering activity.

*Id.* at 59 (cited with approval by *United States v. Walsh*, 700 F.2d 846, 851 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983)).

This reasoning applies with equal force to civil RICO. See *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1131 (3d Cir. 1988); *County of Cook v. Berger*, 648 F. Supp. 433, 434-35 (N.D. Ill. 1986). RICO's civil damages provision is an integral part of Congress' effort to combat organized criminal activity. See *Sedima*, 473 U.S. at 493 (RICO is intended to "fill prosecutorial gaps."); *Malley-Duff*, 483 U.S. at 149-50. It was anticipated that civil actions would help bring an end to the perpetrators' pattern of conduct. See *Sedima*, 473 U.S. at 487 ("[T]hose who have been wronged . . . should at least be given access to a legal remedy. . . . [T]he availability of such a remedy would enhance the effectiveness of RICO's prohibitions." (internal quotation marks and citation omitted)).

Basing accrual of a civil RICO claim on the end of an integrated RICO pattern assures that civil RICO actions bring the pressure of "private attorneys general" to bear on ongoing criminal enterprises. *Malley-Duff*, 483 U.S. at 151. As noted above, Congress intended courts to apply civil RICO broadly to supplement criminal RICO and promote its "remedial purposes":

RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub. L. 91-452, § 904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

*Sedima*, 473 U.S. at 497-98 (citations omitted).

The last predicate act rule holds intact the claims of all those injured by a single RICO pattern and thereby assures that the enterprise is exposed to the full measure of civil and



criminal responsibility envisioned by Congress. If it were otherwise, civil RICO would do little more to root out criminal enterprises than the relatively ineffective state remedies for individual injuries RICO was intended to supplant. Racketeering enterprises are frequently deeply rooted in legitimate businesses which can absorb the impact of state remedies and still continue their lucrative criminal activities. For this reason, Congress aimed RICO, not at isolated crimes and single injuries (*see H.J., Inc.*, 492 U.S. at 242), but at a defendant's entire "pattern" of crime, thereby striking at the heart of the evil to be remedied.

The circumstances in this case demonstrate the inadequacy of attempts to eradicate pattern conduct through isolated litigation. AOSHPI has been the subject of individual state lawsuits for many years. When it was sued in California in the 1960s, rather than cease its fraudulent activities, its response was defiant: "No little California farmer can whip a big corporation." App. 487; "[I]f [the plaintiffs] do prevail, . . . we can appeal this thing and drag it out for years and years and years[.] Are you prepared to wait?" App. 490. Although AOSHPI was ultimately forced to give up its California market, it continued selling Harvestores elsewhere. RICO's objectives require that the victims of racketeers—private "attorneys general"—be permitted to retain all of their claims until the *pattern* of criminal activity has ended. *See H.J., Inc.*, 492 U.S. at 242 ("Congress was concerned in RICO with long-term criminal conduct."); *Keystone*, 863 F.2d at 1131-32.<sup>8</sup>

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<sup>8</sup>A form of the "last predicate act" rule adopted by the Third Circuit has been criticized because it may permit plaintiffs to bring civil RICO actions long after the wrongdoing has ended. *See, e.g., Rodriguez*, 917 F.2d at 667-68. This "open-endedness" is not a concern if the Court adopts the criminal "last predicate act" rule, which has no "discovery" component. Because the Klehrs were injured by a RICO scheme which has not yet ended,

## 2. The last predicate act rule offers RICO victims full compensation.

Congress intended civil RICO to provide a legal remedy to those wronged by violations of the Act. *Sedima*, 473 U.S. at 487. Thus, consideration of full compensation is an important factor in adopting a RICO accrual rule. *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 340 (1971) (federal law should "fully protect the victims of the forbidden practices"). The last predicate act accrual rule protects the rights of all victims of continuing RICO patterns to compensation for their injuries.

It is unlikely that Congress, in enacting RICO's "broad remedial" provisions, intended that an injured party's statutory right to damages caused by pattern conduct would be lost simply because it accrued at some arbitrary point in the midst of the ongoing pattern.<sup>9</sup> Yet, an "injury-based" accrual rule has precisely that effect:

It would be inconsistent with [congress's] breadth of definition [of the Act] for us to state that we will look to the past ten years to see if a civil RICO claim exists but if we find ten years of racketeering

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this Court may adopt the last predicate act rule in this case, without deciding whether to use the "discovery" component.

<sup>9</sup>The offenses which constitute "predicate acts" are, for the most part, very serious crimes committed by career criminals associated with networks of co-conspirators with ample financial resources. *See* 18 U.S.C. § 1961(1) (listing, *inter alia*, bribery, counterfeiting, obstruction of justice, embezzlement). There are many reasons a victim of such a crime may not be willing to sue until the end of the criminal association, when he has learned of others with similar claims or when the scheme is at an end and a criminal prosecution has begun. An accrual rule must take into account the difficulties facing victims of crime organizations. *See Reed*, 488 U.S. at 327.

activity, all related and all perpetrated by the same defendants, we will provide a remedy only to those who were victimized within the past four years. To do so would encroach upon and limit a legislatively-enacted scheme to provide recovery for racketeering injuries.

*Keystone*, 863 F.2d at 1132.

Certainly, in selecting an accrual rule, this Court must attempt to approximate “the point at which the interests favoring protection of valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.” *Wilson*, 471 U.S. at 271 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)). Here, however, the structure and purpose of the Act require that the balance tip in favor of protecting the rights of victims of ongoing criminal enterprises. In selecting a term of ten years within which predicate acts could establish the pattern requirement, “Congress must have contemplated recovery for remote acts and even for remote injuries.” *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *see also H.J., Inc.*, 492 U.S. at 242 (Congress intended to wipe out “long term criminal conduct.”). Claims brought by victims of ongoing pattern conduct are no more “stale” than a criminal action commenced by the government.

A RICO defendant who is engaged in an ongoing criminal pattern, on the other hand, has no legitimate interest in repose. He should have no right to be “free” of responsibility, whether civil or criminal, for his actions. By choosing to continue to engage in activity violating the Act, he himself creates the possibility of long term civil damages exposure. Such exposure simply reflects that he has not “earned” the right to avoid civil or criminal responsibility for his acts. He should not be “entitled to assume that [his] sins may be forgotten.”

*Malley-Duff*, 483 U.S. at 156 (quoting *Wilson*, 471 U.S. at 271).

The suggestion that despite a defendant’s continued wrongdoing, his *related* past wrongdoing constitutes a “stale” claim, ironically rewards the very racketeer whom RICO was intended to stop and promotes *no* legitimate public policies. Society, the courts, and Congress can have no interest in permitting a continuing wrongdoer to escape liability for past, related wrongdoing simply because a number of years has passed during which the wrongdoing has continued. The last predicate act accrual rule is the only rule which promotes RICO’s purposes to provide compensation to all victims of ongoing RICO patterns and to “extirpat[e]” long-term criminal conduct. *Sedima*, 473 U.S. at 488.

#### C. The Last Predicate Act Rule Simplifies the Judicial Task and Reduces Litigation.

The “last predicate act” rule not only promotes RICO’s purposes, it is relatively simple to apply and reduces time-consuming litigation over the timeliness of claims. Courts can decide the timeliness of a plaintiff’s civil RICO claim under the rule simply by determining whether the defendant committed at least one predicate act as part of the pattern of racketeering during the four years preceding the commencement of the action. *See, e.g., United States v. Starrett*, 55 F.3d 1525, 1544-45 (11th Cir. 1995) (“to bring the crime within the statute of limitations under § 1962(c), the government need only prove that at least one predicate act was committed within five years of the date the defendant was charged in the indictment”), *cert. denied*, 116 S. Ct. 1335 (1996). So long as the defendant committed a predicate act within that four-year period, and so long as that predicate act is part of the pattern of racketeering that is the focus of the plaintiff’s claim,

then the plaintiff's action—and the government's prosecution—is timely.

The benefit of focusing on the last predicate act in the pattern of racketeering is that the court avoids, at the very outset of the case, defining the point at which a particular plaintiff first suffered a "RICO injury" or when he first should have known that the defendant's "racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J., Inc.*, 492 U.S. at 239. The history of the lower courts' adoption of differing versions of similar injury accrual rules, "separate accrual" subrules and various tolling doctrines suggests that the last predicate act accrual rule is the only rule which will avoid drawing the parties and the courts into protracted and expensive litigation over issues collateral to the RICO claim itself. *See Wilson*, 471 U.S. 261 at 270 (1985) (recognizing federal interest in uniformity and in application of "firmly defined, easily applied rules").

#### D. The Eighth Circuit's Injury and Pattern Discovery Accrual Rule Fails to Promote the Purposes Underlying RICO.

The Eighth Circuit, in this case, adopted an injury-based accrual rule that provides that the statute of limitations begins to run, "as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern." 87 F.3d at 238. Although admittedly superior to a straight "injury" rule,<sup>10</sup> the

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<sup>10</sup>Because "[c]oncepts such as RICO 'enterprise' and 'pattern of racketeering activity' were simply unknown to the common law," common-law accrual principles do not apply. *Malley-Duff*, 483 U.S. at 150 (quoting *A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 348 (3d Cir. 1986) (Sloviter, J., concurring in the judgment)). An "injury" cannot constitute the sole determinant of the "accrual" of a RICO

"injury and pattern discovery" rule, like other injury-based rules, operates to cut off valid claims such as the Klehrs', despite the existence of an ongoing RICO pattern. This Court should not hesitate to reject this accrual rule and adopt the last predicate act rule in order to promote RICO policies and ease the judicial task. "RICO was an aggressive initiative to *supplement* old remedies and develop *new methods* for fighting crime." *Sedima*, 473 U.S. at 498 (emphasis added). It is "in this spirit that all of the Act's provisions should be read." *Id.* Consistent with this admonishment, this Court should adopt the accrual rule tailored specifically to accommodate the unique elements and purposes of a civil RICO claim: the criminal RICO "last predicate act" rule.

Applied to this case, the last predicate act rule renders the Klehrs' claim timely. This action was commenced in August 1993. The Klehrs submitted evidence establishing predicate acts through at least 1991. *See*, App. 17. Thus, the four-year limitations period did not expire before the suit was brought. Accordingly, the Klehrs ask this Court to reverse the decision

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claim because a RICO plaintiff must show injury from acts in a pattern and the predicate acts which form the pattern may occur after the injury. *See Sedima*, 473 U.S. at 496; *Keystone*, 863 F.2d at 1130 (It would appear fundamental that the statute of limitations may not begin until all elements exist); *Butler v. Local Union 823*, 514 F.2d 442, 450 (8th Cir.) (There is no accrual until all facts exist so plaintiff can allege a complete cause of action.), *cert. denied*, 423 U.S. 924 (1975). Nevertheless, some courts have adopted "injury" accrual rules which bar an action before it even exists. *See, e.g., Rodriguez*, 917 F.2d 664. This approach is not only nonsensical, but a rule which would bar a claim before it accrues "would in effect eliminate § 1964(c) from the statute" for those plaintiffs. *Sedima*, 473 U.S. at 498. Such a result is hardly consistent with the purpose of "bringing to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate." *Malley-Duff*, 483 U.S. at 151.



of the Eighth Circuit, and remand this action to the district court for trial.

### III. THE EIGHTH CIRCUIT MISAPPLIED THE PATTERN PLUS INJURY STANDARD.

Even under the erroneous "injury plus pattern discovery" standard employed by the courts below, AOSHPI was not entitled to summary judgment dismissing the Klehrs' RICO claim. As a threshold matter, the Eighth Circuit improperly placed the burden of disproving the statute of limitations affirmative defense on the Klehrs. It then resolved disputed issues of fact regarding whether the Klehrs should have discovered the connection between their injuries and the heat-damaged feed prior to 1989. Accordingly, this Court should reverse.

#### A. The Eighth Circuit Improperly Placed the Burden of Proof on the Klehrs.

In this case, the fact that AOSHPI, the *moving* party, bore the burden of proof is significant. As the moving party, AOSHPI bore the initial burden of establishing that summary judgment was appropriate. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A district court, in deciding whether the moving party has met this burden, must determine which party bears the ultimate burden of persuasion at trial. *Id.* at 331 (Brennan, J., dissenting.). If the party moving for summary judgment also bears the burden of proof on a claim, it must support its motion with undisputed material evidence on each element of its claim. *Id.*

Because AOSHPI bore the burden of establishing the statute of limitations affirmative defense, it was not entitled to summary judgment unless it produced sufficient evidence to

obtain the equivalent of a directed verdict on that defense.<sup>11</sup> See *Celotex*, 477 U.S. at 322-23; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Not until this level of proof was reached should the Klehrs have been required to put in *any* evidence to defeat the motion for summary judgment. *Augustine v. GAF Corp.*, 971 F.2d 129, 132 (8th Cir. 1992). Once AOSHPI met the burden of production, the court was required to examine the parties' evidence in the light most favorable to the Klehrs, giving them the benefit of every inference and resolving all factual disputes in their favor. See *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). Only if no reasonable jury could find for the Klehrs, should AOSHPI have been entitled to prevail without a full trial.<sup>12</sup>

Under Federal law, the statute of limitations is an affirmative defense. See Fed. R. Civ. P. 8(c). Because the party pleading an affirmative defense bears the burden of

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<sup>11</sup>If the *non-moving* party bears the burden of persuasion on the issues at trial, summary judgment may be granted if the *non-moving* party fails to offer proof creating a jury issue on every element of its claim. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

<sup>12</sup> Summary judgment standards should be enforced so that summary judgment is not used to avoid the necessity for proving one's case or as a clever procedural gambit whereby a claimant can shift to an adversary the burden of proof on one or more issues. See Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?* 63 Notre Dame L. Rev. 770, 781 (1988). One author describes the lower courts' reaction to *Celotex* as a backlash or "anti-plaintiff counter-revolution." See generally D. Michael Risinger, *Another Step in the Counter-Revolution: a Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 Brook. L. Rev. 35 (1988); See also Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudicative Process*, 49 Ohio St. L.J. 95, 159 (1988) (By making summary judgment easier to obtain, courts implicitly bestowed a political favor (and greater judicial power) . . . on society's "haves.").

proof, (see *Smith v. Duff & Phelps, Inc.*, 5 F.3d 488, 492 n.9 (11th Cir. 1993)), AOSHPI had the burden to prove that the Klehrs' RICO claims were barred. Contrary to these rules, the Eighth Circuit held that "[I]t is incumbent upon the Klehrs to show that it would not have been reasonable to discover the existence, source, and pattern of their injury by August 27, 1989." 87 F.3d at 238 (emphasis added).<sup>13</sup> In so holding, the Eighth Circuit improperly saddled the Klehrs with the burden of proof. Accordingly, this Court should reverse.

**B. The Klehrs' Failure to Discover That the Harvestore Caused Heat Damage to Their Feed and That the Feed Damaged the Cattle Was Reasonable.**

The first step in applying the "injury plus pattern discovery" rule is to identify the RICO injury for which the plaintiff seeks relief. Here, the Klehrs seek to recover for the damage caused to their farm as a result of their cattle's consumption of heat-damaged feed from the Harvestore. As shown below, reversal is required because AOSHPI failed to prove that the Klehrs knew or should have known that this feed was heat damaged, as a matter of law. See *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464 (1962) (the purpose of the rule is not to cut litigants off from their right of trial by jury).

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<sup>13</sup>The Eighth Circuit not only put the burden of proof on the Klehrs, it articulated an erroneous standard. The issue is not whether it would have been "reasonable" for a hypothetical farmer to have discovered the fraud. In determining whether the Klehrs "should have discovered the fraud," the question is whether AOSHPI proved, as a matter of law, that the Klehrs failed to act as reasonably prudent farmers given the circumstances, i.e., whether their actions fell outside the bounds of reasonable conduct.

**1. No evidence of bad feed existed.**

The lower courts held, as a matter of law, that the Klehrs should have known that their feed was defective because Marvin Klehr saw pieces of mold in the feed sporadically during the year and at the end of the year was required to discard the remnants of the feed stack. See App. 172-73, ¶ 4. The courts' focus on occasions of moldy feed ignores the fact that the feed which damaged the Klehrs' cattle, and which is the basis for this action, was not moldy feed, but warm, dark, molasses-smelling, "good Harvestore feed."

The evidence did not demonstrate that the existence of mold in some of the feed, on some occasions, must lead, as a matter of law, to discovery that the "good" feed was in fact heat-damaged. Harvestore representatives examined the feed and assured Klehr that the feed was good. App. 172-73, ¶4. AOSHPI's representative explained that the mold resulted from exposure of the top layer of feed to air at the time the silo was filled. This spoilage was insignificant in proportion to the "good" feed stored, and was consistent with Klehr's expectations for the silo's performance based on his experience with stave silos and the fact that he filled his silo several times during the year. See App. 172-73, ¶ 4. See *Chitwood v. A. O. Smith Harvestore Prods., Inc.*, 489 N.W.2d 697, 705 (Wis. Ct. App. 1992) (it is not contradictory for the farmer to know some oxygen gets into the silo and to also believe that the Harvestore admits less oxygen than a standard silo). There was absolutely nothing about this occasional mold that required Klehr to know that air entered the silo after it was "sealed" and damaged the "good" feed.

**2. The Klehrs acted prudently in their investigation of herd health problems.**

The courts below said that the Klehrs should have known that the "good" Harvestore feed was damaging their cows because they had not realized all of the promised benefits of Harvestore ownership and because herd health had generally declined over the years. The flaw in this analysis is that, as shown below, there is no evidence that the Klehrs were negligent in failing to discover any connection between broken sales promises or herd health problems and the existence of heat-damaged feed. *Hines v. A.O. Smith Harvestore Products, Inc.*, 880 F.2d 995 (8th Cir. 1989).

**a. Klehr's conduct should be judged by prudent farmer standards.**

AOSHPI submitted no testimony from any competent source proving that the Klehrs failed to act as prudent farmers in addressing herd health problems or in failing to detect that bad feed was their source. Farming is complex and involves unique skills and experience. (See, e.g., App. 680 (plant tissue analysis may help farmers determine whether "a subtle deficiency or imbalance of some vital element . . . is throwing off his crop productivity"); App. 815-16 (haylage making is an "art")). Accordingly, a farmer's due care should be judged by an appropriate standard reflecting standard farm practices and expertise. See *Linkstrom v. Golden T. Farms*, 883 F.2d 269, 271 (3d Cir. 1989). Yet AOSHPI submitted no evidence at all regarding the reasonableness of the Klehrs' actions, judged by farm standards. Given the burden of proof, AOSHPI's failure to submit such proof required the denial of summary judgment.

Even if the Klehrs were required to bear the burden of proving that they acted with ordinary diligence, however, they submitted a wealth of evidence establishing that their actions fell within "prudent farmer" standards. Klehr testified that he reasonably investigated his herd's health problems and both he and his consultants were unable to determine their cause. App. 174-75, ¶6. The Klehrs submitted the affidavit of an expert veterinarian who opined that the Klehrs' failure to connect the herd health problems to bad feed was reasonable.<sup>14</sup> Indeed, not until the Harvestore had there been a silo which caused illness in cows. Because the evidence in the record does not establish lack of due diligence as a matter of law, the courts' entry of summary judgment was erroneous. See *Hildebrandt v. Allied Corp.*, 839 F.2d 396, 399 (8th Cir. 1987) (Where issues of limitation involve when a claim begins to accrue, summary judgment cannot be granted unless the evidence is so clear that there is no genuine factual issue.).

**b. AOSHPI's "puffery" is irrelevant.**

The Eighth Circuit's focus on the Harvestore's failure to live up to some of AOSHPI's advertising promises, such as the Harvestore's production of *better*<sup>15</sup> feed, as the "tip-off"

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<sup>14</sup>The fact that many farmers have asserted claims against AOSHPI in the last decade and these claims have reached juries notwithstanding the defendants' statute of limitations defense, suggests that it is reasonable for a farmer to fail to make the connection between the silo and the damage to the farming operation. See *Lollar*, 795 S.W.2d 441; *First Nat'l Bank of Louisville v. Brooks Farms*, 821 S.W.2d 925 (Tenn. 1991); *Agristor Leasing v. Saylor*, 803 F.2d 1401 (6th Cir. 1986).

<sup>15</sup>Of course, the Klehrs had no idea that the "good Harvestore feed" was not "better" feed. In any event, the Klehrs' lawsuit is based, not on the failure of the Harvestore to produce better feed but on its production of heat-damaged feed.



that the silo was causing the herd's health problems, was misplaced. AOSHPI's "puffery" is simply irrelevant because there is no evidence that any of AOSHPI's sales promises was a "red flag" pointing to the bad feed injury that forms the basis for the Klehrs' claims. AOSHPI made numerous claims touting the value of the silo, including the promise that the Harvestore would "Keep sons on the farm." App. 727. Neither Klehr nor any other farmer would naively believe that all such promises would come true. Indeed, Harvestore specifically told farmers:

It's no magic, miracle-making device that automatically brings wealth and success to its owner. And, its certainly no cure-all for problems that arise from poor management—in fact, a Harvestore might only intensify the trouble where poor management is at fault!

App. 719. *See also* App., 815 (Harvestore is "no magician's box of tricks which can take poor quality feed and transform it into high-quality haylage."). *Cf. D'Huyvetter v. A.O. Smith Harvestore Prods., Inc.*, 475 N.W.2d 587, 592 (Wis. Ct. App. 1991) (it is not necessary for a Harvestore purchaser to have met "every positive statement with incredulity"); *Chitwood*, 489 N.W.2d at 705 (jury need not find reliance on every misrepresentation in order for company to be liable.); *Agristor Leasing v. A.O. Smith Harvestore Prods., Inc.*, 869 F.2d 264, 268 (6th Cir. 1989). Even if a farmer did believe all of the Harvestore sales talk, the failure of these benefits to materialize would not require a reasonably prudent farmer to suspect that the Harvestore feed was heat-damaged. AOSHPI provided the court no evidence establishing that a farmer should, as a matter of law, recognize a link between the two.

Had the Eighth Circuit recognized that AOSHPI had the burden of establishing its statute of limitations defense, it is

unlikely that it would have erroneously affirmed summary judgment in AOSHPI's favor. As it is, the evidence in the record demonstrates that AOSHPI failed to carry its burden of establishing that the Klehrs' RICO claim is barred. Accordingly, this Court should reverse.

#### IV. THE EIGHTH CIRCUIT ERRED WHEN IT REJECTED THE KLEHRS' RICO CLAIM FOR INJURIES OCCURRING WITHIN FOUR YEARS OF COMMENCEMENT OF THE ACTION.

##### A. A New RICO Claim Accrues With Each Injury.

If this Court adopts an "injury"-based accrual rule, the Klehrs are entitled to recover the damages they suffered during the four years preceding the commencement of the action, whether or not their claim for earlier damages is barred by the statute of limitations. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), this Court determined the date of accrual of a plaintiff's damages where, as here, the plaintiff has suffered continuing damage from a violation of federal statute. The Court first noted that under the Clayton Act,

each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . , as to those damages, the statute of limitations runs from the commission of the act.

*Id.* at 338. The Court observed, however, that this rule undercompensates a plaintiff who suffers additional damages which, four years after the injurious act, are speculative or unprovable. *Id.* at 339. Accordingly, the Court held that at any particular point in time, "no cause of action has yet

accrued for any but those damages already suffered." *Id.* The claim accrues for such damages "only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted." *Id.* (emphasis added). Any other rule would be "contrary to the congressional purpose that private actions serve 'as a bulwark of antitrust enforcement'" (*id.* at 340 (quoting *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968))) and would not "fully protect the victims of the forbidden practices as well as the public." *Id.*

Because the injury plus pattern discovery accrual rule focuses on each new RICO injury rather than on the unitary RICO pattern, *Zenith's* "separate accrual rule" creates a new RICO cause of action each time a plaintiff suffers an injury during the limitations period, so long as the damages are caused by a predicate act in the pattern. Thus, if the Court adopts an "injury-based" accrual rule, the Klehrs must be permitted to recover the damages they suffered as a result of AOSHPI's RICO scheme during the four years preceding the commencement of this action.

**B. Because AOSHPI Committed Predicate Acts Within the Limitations Period, the Klehrs Have an Additional Basis For Recovery of their Damages.**

Some courts, including the Eighth Circuit, have restricted *Zenith* and permit recovery for injuries within the limitations period only if they were caused by predicate acts which also occur within the limitations period. *Granite Falls Bank*, 924 F.2d at 154. In *State Farm Mutual Auto. Ins. Co. v. Ammann*, 828 F.2d 4 (9th Cir. 1987), then-Judge Kennedy applied this formulation of the "separate accrual" rule in the RICO context:

The rule is that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and other acts were committed outside the limitations period.

*Id.* at 5 (Kennedy, J., concurring). Although the Klehrs believe that these courts have misread *Zenith*, they are entitled to recover under this even more restrictive rule because AOSHPI committed predicate acts within the limitations period which caused damage.

The Eighth Circuit held in this case, however, that no separate claim accrues unless new predicate acts cause injuries which are "independent" from the original injury. Because the Klehrs' injuries were "all of the same type, flow from the same source, and are part of one cognizable pattern of conduct," they were, the court held, "one single, continuous injury that was sustained sometime in the 1970s." 87 F.3d at 239. Accordingly, the court held that their claims were barred.

There is no sound basis for the Eighth Circuit's requirement that the Klehrs' injuries be "independent from" their past injuries or that they arise independently of AOSHPI's prior pattern conduct. This analysis would put a plaintiff in the impossible position of having to prove both that his injuries from two separate predicate acts are related—to establish pattern—and that they are unrelated—to establish separate accrual. Under the separate accrual rule, it is irrelevant whether the damages are of a certain "type" or that they arise from the same pattern. *See Sedima*, 473 U.S. at 495 ("If the defendant engages in a pattern of racketeering activity . . . , and the racketeering activities injure the plaintiff . . . , [he] has a claim under § 1964(c).").

The Eighth Circuit's decision creates an intolerable incentive for a racketeer to continue to harm a victim of an earlier time-barred violation so long as the injuries are of the same type and "are part of one cognizable pattern of conduct."

If anything, such a rule will encourage racketeers to victimize those in society who are most credulous and who, accordingly, fail to discover the fact that they have been cheated. In effect, this rule elevates the interests of the criminal wrongdoer, over the interests of a victim who "should have" discovered the source and pattern of wrongdoing earlier. See *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1599 (1996) (deceit is more reprehensible than negligence).

In this case, after AOSHPI sold the Klehrs their silo, it continued to victimize them by encouraging them to use the silo, by "repairing" it, by "resealing" it and by supplying them with advertisements and "educational" material which convinced them to continue feeding their cows feed which, unknown to them, was heat-damaged. As a result, their continued use of the Harvestore caused new injuries: the cattle exhibited new illnesses requiring treatment and milk production declined. See *Bieter v. Blomquist*, 987 F.2d 1319, 1325-27 (8th Cir.) (refusing to apply unduly restrictive understanding of proximate cause to civil RICO action, *cert. denied*, 510 U.S. 823 (1993)). Yet, accepting *arguendo*, the Eighth Circuit's factual determinations, the Klehrs are left without remedy despite no wrongdoing on their part and absolute wrongdoing (including an ongoing pattern of predicate acts and an ongoing "coverup" of those acts) on the part of AOSHPI. Such a result is inconsistent with Congress' stated intent to extirpate the wrongdoing that is the target of RICO. This Court should reject the Eighth Circuit's interpretation of the "separate accrual" rule and remand the case for trial on the claims arising in connection with AOSHPI's predicate acts committed within four years of the start of this action.

## V. AOSHPI'S FRAUDULENT CONCEALMENT PREVENTED THE RUNNING OF THE FOUR-YEAR LIMITATIONS PERIOD.

If the Court both rejects the "last predicate act" rule and finds Klehr's action to be untimely as a matter of law under an "injury discovery" or "injury plus pattern discovery" accrual rule, then the Court should reverse because the statute is tolled by AOSHPI's fraudulent concealment of the claim. The theory of fraudulent concealment, which is "read into every federal statute of limitation," (*Holmberg v. Armbricht*, 327 U.S. 392, 397 (1946)), has two competing formulations. See *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996).<sup>16</sup> One formulation—which parallels equitable tolling and the "discovery" rule—requires that "the plaintiff . . . use due diligence to be allowed to toll the statute of limitations." *Id.* Under the other formulation, which focuses on "active misconduct by the defendant, the plaintiff is not required to be diligent." *Id.*<sup>17</sup>

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<sup>16</sup>Since this Court's decision in *Malley-Duff*, there has been unanimity in the courts of appeals that federal rather than state tolling doctrines apply to civil RICO actions. See, e.g., *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 347 (2d Cir. 1994); *Davis v. Grusemeyer*, 996 F.2d 617, 624 & n.12 (3d Cir. 1993); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1453 (7th Cir. 1991); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1199 (9th Cir. 1988).

<sup>17</sup>If the Court adopts a non-discovery rule, the Klehrs' claim is tolled under any formulation of the fraudulent concealment or equitable tolling doctrines. See *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1415-16 (9th Cir. 1987) (applying "discovery," as opposed to "actual knowledge," version of fraudulent concealment doctrine to civil RICO action). Equitable tolling doctrines apply because the lower courts' determination that the Klehrs should have discovered the fraud is erroneous for all of the reasons discussed in part IIIB, above.



The latter rule should apply here. As the Second and Seventh Circuits have acknowledged, the purpose behind the fraudulent concealment rule is disserved by making its scope coterminous with the "discovery" rule. See *Robertson v. Seidman & Seidman*, 609 F.2d 583, 593 (2d Cir. 1979); *Sperry v. Barggren*, 523 F.2d 708, 711 (7th Cir. 1975); see also *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1491 (D.C. Cir. 1989) ("a defense based on the plaintiff's lack of due diligence must show something closer to actual notice than the merest inquiry notice that would be sufficient to set the statute of limitations running in a situation untainted by fraudulent concealment").

Rather, the rule should punish a defendant who actively conceals his original wrongdoing. See *Riddell*, 866 F.2d at 1491; *Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir. 1975), *overruled on other grounds by Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 502 U.S. 1250 (1991). The *Tomera* court explained: "[I]f the wrongdoer adds to his original fraud affirmative efforts to divert or mislead or prevent discovery, then he gives to his original act a continuing character, by virtue of which he deprives it of the protection of the statute until [actual] discovery." 511 F.2d at 510 (quoting *Smith v. Blachley*, 47 A. 985, 987 (Pa. 1901)). The *Riddell* court explained that a defendant's burden of establishing "something close[] to actual notice" results from the fact that

fraudulent concealment by its nature makes discovery of the true facts more difficult, in part because it obscures the significance of such information as comes to plaintiff's attention. Furthermore, the concealing defendant lacks the equity to command easier access to the defense, especially in view of the inherent evidentiary difficulty of determining whether particular but

isolated facts should have put the plaintiff on inquiry notice of his claim.

866 F.2d at 1491. This rule makes sense because deceit is more reprehensible than negligence, and should not be rewarded. See *BMW*, 116 S. Ct. at 1599.

Judges Becker and Posner have each outlined the policy rationales for applying a different rule of fraudulent concealment to affirmative acts of misconduct. See *Wolin*, 83 F.3d at 852; *Urland*, 822 F.2d 1268, 1280-81 (3d Cir. 1987) (Becker, J., dissenting). In *Urland v. Merrell-Dow Pharmaceuticals*, Judge Becker explained that the perpetrator of affirmative acts of concealment should not benefit from a victim's lack of diligence:

The doctrine of fraudulent estoppel rests on a rationale that is wholly distinct from that for the discovery rule. It concerns not the diligence of the plaintiff but the misdeeds of the defendant; it therefore addresses the situation where a cause of action goes undiscovered because the defendant has taken positive steps to conceal it. . . .

. . . When a defendant fraudulently conceals its misconduct, . . . the injured person has a double burden: not only is there a burden of discovering the basis of the claim, he or she must also discover the defendant's fraud. A "should have known" standard is therefore inappropriate because it is also necessary to account for the plaintiffs' extra burden of acquiring knowledge of the fraud, without which they could not discover, or realize that prior to the fraud they had discovered, the basis for the claim.

822 F.2d at 1280-81 (citation and footnote omitted).

One way to "account[]" for this extra burden is by insisting on a higher threshold of knowledge on the part of the plaintiff before the claim will be barred—the 'actual knowledge' standard . . . ." *Id.* at 1281. If the Court does not account for the extra burden on the plaintiff that exists in cases of affirmative concealment by a defendant, the Court may

unwittingly adopt[] a standard that . . . arguably encourage[s] fraudulent concealment by defendants. Because, through the discovery rule, the statute of limitations does not begin to run until the plaintiff should have known of defendant's liability, application of the "should have known" standard in fraudulent concealment cases creates no greater burden; defendants face no penalty if they attempt to conceal their wrongdoing but are later discovered.

*Id.* "In contrast," Judge Becker notes, "the actual knowledge standard 'serves as a punitive measure and perhaps as a deterrent of future fraud.'" *Id.* (quoting *Hohri v. United States*, 782 F.2d 227, 248 (D.C. Cir. 1986), *vacated for want of jurisdiction*, 482 U.S. 64 (1987)).

Chief Judge Posner's analysis of the issue is equally cogent:

An analogy can be drawn to the distinction between accidental and deliberate torts. There is no defense, partial or complete, of contributory negligence to the latter, but there is to the former. Deliberate wrongdoing is not to be blamed on the victim, just as the victim's provocation or other fault is not a defense to criminal liability.

*Wolin*, 83 F.3d at 852. The very same principle applies in the case of affirmative acts of concealment by a defendant: there

can be no defense, partial or complete, of some failing on the part of the victim.

AOSHPI should not be rewarded for successfully concealing its prior fraud. It was not until Marvin Klehr unbolted a panel on his silo and chopped through several feet of "good Harvestore feed" to find mold cascading from the feed dome that he actually knew what AOSHPI had done to his dairy herd, his way of life, and their family's financial well-being. This discovery should be the point at which the statute of limitations should begin to run.

### CONCLUSION

Bearing in mind that the rule of accrual the Court adopts in this case will broadly impact all RICO cases including those involving organized crime syndicates, the Klehrs ask this Court to adopt the one rule which promotes the purposes of RICO: the last predicate act rule. Accordingly, the Court should reverse the judgment below and remand to the district court for trial on the merits.

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No. 96-663

In the  
**Supreme Court of the United States**  
October Term, 1996

MARVIN KLEHR and MARY KLEHR,  
*Petitioners,*

v.

A.O. SMITH CORPORATION and  
A.O. SMITH HARVESTORE PRODUCTS, INC.,  
*Respondents.*

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

**RESPONDENTS' BRIEF ON THE MERITS**

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## STATEMENT OF THE CASE

### **A. Background**

The civil RICO statute, 18 U.S.C. § 1964, does not expressly provide a statute of limitations period or rule of accrual. Nearly 10 years ago, this Court determined the applicable limitations period, but expressly declined to decide when a civil RICO claim accrues, because that issue was not presented. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). The federal courts of appeals have wrestled with this issue, and have been unable to agree on the appropriate accrual rule.

The majority of the courts of appeals have held that a civil RICO claim accrues and the statute of limitations begins to run when a plaintiff discovers, or should have discovered, his injury. This rule has become known as the injury discovery rule. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *accord Grimmer v. Brown*, 75 F.3d 506, 511 (9th Cir.), *cert. granted*, 116 S. Ct. 2521 (1996), *cert. dismissed*, 117 S. Ct. 759 (1997); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992); *Rodriguez v. Banco Cert.*, 917 F.2d 664 (1st Cir. 1990) (Breyer, C.J.); *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *see also Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-90 (D.C. Cir. 1989) (assuming, without deciding, that injury discovery rule applies to civil RICO claims).

Some courts of appeals, however, have expressed concern that such a rule, applied literally, would have an unintended and unreasonably harsh effect under two sets of

circumstances, initially raised by the Third Circuit in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). The Third Circuit was concerned that, under an injury discovery rule, a plaintiff might be time-barred before the elements of his claim even existed if, for example, he was injured by a single predicate act and the defendant did not commit additional predicate acts forming a pattern until more than four years later. *Id.* at 1129. Second, the Third Circuit was concerned that in some cases, a plaintiff, although aware of his injury, might not be able to discover that the injury was part of a "pattern" of criminal activity until after the limitations period had run. *Id.* at 1130.

The Third Circuit's initial approach to accommodating plaintiffs under these circumstances was to adopt what has become known as the last predicate act or last injury rule. Under that rule, the limitations period remains open until four years after the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of criminal activity, regardless of whether that act resulted in injury to the plaintiff, or to anyone. *Id.* at 1126.

Following *Keystone*, other courts of appeals, including the Eighth Circuit, addressed the same concerns by applying a less open-ended rule. Under this rule, a civil RICO cause of action accrues when a plaintiff discovers, or reasonably should have discovered, the existence and source of his injury and that the injury is part of a pattern. See *Klehr v. A. O. Smith Corp.*, 87 F.3d 231, 238 (8th Cir. 1996), *cert. granted*, 117 S. Ct. 725 (1997); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir.

1990), *cert. denied*, 500 U.S. 910 (1991).<sup>1</sup> This rule has become known as the injury and pattern discovery rule.

No other court of appeals has adopted the Third Circuit's last predicate act or last injury rule. That rule has been roundly criticized, and even the Third Circuit has signaled a retreat from that rule in subsequent decisions. See, e.g., *Davis v. Grusemeyer*, 996 F.2d 617, 625 n.16 (3d Cir. 1993) (providing an interpretation of the *Keystone* rule virtually indistinguishable from the injury and pattern discovery rule); *Glessner v. Kenny*, 952 F.2d 702, 706 (3d Cir. 1991) (narrowing the last injury prong to include only separate and independent injuries).

This case presents the Court with an opportunity to resolve the question reserved in *Malley-Duff* as to when a civil RICO action accrues, and to address the problems that have troubled the lower courts regarding the appropriate accrual rules. The Court should apply the traditional federal accrual rule to civil RICO claims. Under the traditional rule, a civil RICO cause of action would accrue when the elements of the claim exist and the plaintiff discovers or should have discovered his injury. As will be shown below, this traditional federal rule of accrual fully accounts for all of the concerns expressed by the different courts of appeals, is consistent with law in analogous areas, and most equitably embodies the twin principles of diligence and repose that underlie all statutes of limitation.

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<sup>1</sup> Although the Sixth Circuit has affirmatively rejected the Third Circuit's last predicate act or last injury rule, it has yet to adopt a specific accrual rule. Instead, in two cases, it has found claims time-barred under either an injury discovery rule or an injury and pattern discovery rule. See *Caproni v. Prudential Securities Inc.*, 15 F.3d 614, 620 (6th Cir. 1994); *AgriStor Fin. Corp. v. VanSickle*, 967 F.2d 233, 241 (6th Cir. 1992).

## B. Proceedings

Petitioners Marvin and Mary Klehr are dairy farmers who purchased a Harvestore silo in 1974, used the silo from July 1975 until May 1991, and filed this action on August 27, 1993, asserting various state law claims and a civil RICO claim under 18 U.S.C. §1964(c). Pet. App. B-1-2; J.A. 313, 318. Petitioners claimed they were induced to purchase the silo based on respondents' representations that the silo would prevent oxygen from contacting the feed stored within it, and would therefore eliminate spoiled or moldy feed, improve the health of their cows, increase their milk production by three to five pounds of milk per cow per day, drastically reduce or eliminate the need for costly protein supplements in the herd's daily rations, and increase their profitability so that the silo would pay for itself in four to five years. Pet. App. B-2-3. Petitioners claimed to have received through the mail at least 20 brochures, magazines or other advertisements making some or all of these representations before purchasing the Harvestore, and to have known that respondents had made these representations to other farmers. Pet. App. B-17, G-1-12; J.A. 116, 123, 128-129.

Petitioners allege that *none* of these represented benefits of the Harvestore silo materialized. Instead, petitioners allege, feed unloaded from the silo included chunks of mold and spoilage as early as 1976, and in every year thereafter; their cows experienced an *increase* in health problems, and new types of health and reproductive problems, soon after they began to feed from the silo, and each year thereafter; they were never able to reduce protein supplements; milk production did not increase; and profitability did not increase,

so the silo did not pay for itself in 4-5 years. Pet. App. B-3-8.<sup>2</sup>

Petitioner Marvin Klehr testified that he was an experienced dairy farmer in 1974, knew that exposure of feed to oxygen caused mold and spoilage, and knew that mold and spoilage was harmful to cows. Pet. App. B-12.

The U.S. District Court for the District of Minnesota did not reach the merits of petitioners' allegations because it

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<sup>2</sup> In addition to the allegations submitted to the courts below, petitioners' brief includes certain assertions made for the first time before this Court. Two bear further discussion. Petitioners claim that Harvestore silos *never* work and that there is no research supporting their effectiveness as a method of storing animal feed, e.g. Pet Br. at 3, 5 (Harvestores, as a matter of science "don't work"), 4 (respondents "knew . . . that no science stood behind its claims"). There was *no* evidence in the record below to support these assertions, and they are not true. Approximately 83,000 Harvestore silos have been sold since 1949; in contrast, fewer than 270 legal claims have been brought challenging their effectiveness for storing feed. Furthermore, Harvestore silos have been owned, operated and tested by various governmental agencies and scores of colleges and universities nationwide for the past 45 years. Independent experts from the United States Department of Agriculture, the Ministry of Agriculture for the Province of Ontario, the University of Wisconsin, the University of Illinois, the University of Minnesota, Iowa State University, and other land-grant universities have conducted dozens of scientific experiments and feeding trials, which conclude that Harvestore silos safely and effectively store feeds and support excellent livestock production. See, e.g., L. Kung, et al., Abstract, *Extent of Heat Damaged Protein and Nitrogen Degradability in Alfalfa Haylage as Related to Silo Structure, Protein and Dry Matter Content*, 55 J. Animal Sci. 315 (1982 Supp. 1); M.P. Hoffman and H.L. Self, *Comparison of Artificially Dried Corn with High-Moisture Corn Stored in Two Silo Types*, 41 J. Animal Sci. 500, 506 (1975); J.H. Clark, et al., *Feeding Value of Dry Corn, Ensiled High Moisture Corn, and Propionic Acid Treated High Moisture Corn Fed with Hay or Haylage for Lactating Dairy Cows*, 56 J. Dairy Sci. 1531, 1537 (1973); H.J. Larson, et al., *A Comparison of Haylage and Wilted Grass Silage Plus Hay in the Dairy Cow Diet* (August 1971) (Research Report No. 78 -- Univ. of Wisc. & U.S. Dept. of Agric.); J.D. McCaffree and W.G. Merrill, *High Moisture Corn for Dairy Cows in Early Lactation*, 31 J. Dairy Sci. 553, 558-60 (1968).



granted summary judgment for respondents on the ground that the action was time-barred, applying to their civil RICO claim a four-year limitations period and the Eighth Circuit's injury and pattern discovery accrual rule. Pet. App. B-16-17, B-19. Taking petitioners' allegations and testimony as true, the court found that the only reasonable inference that could be drawn from the evidence was that the Klehrs "should have known shortly after using the Harvestore silo that they were not receiving the represented benefits which induced them to purchase the silo." Pet. App. B-11-12, B-17. Further, petitioners should have discovered that the alleged injury was part of a pattern at the same time. Pet. App. B-17.

The court also held that the separate accrual rule and the fraudulent concealment doctrine did not apply to the facts of this case. Pet. App. B-18, B-19 n.6, B-15. A new cause of action did not accrue within the limitations period based on allegations that petitioners continued to suffer damages, because those damages were merely a continuation of damages arising from petitioners' initial injury when they purchased and began using the silo in the 1970s. Pet. App. B-18.

The fraudulent concealment doctrine did not apply because the alleged acts of concealment -- pre-sale and identical post-sale advertising misrepresenting the characteristics of the silo, and concealment of knowledge that the silo was defective -- did not prevent petitioners' discovery of the facts establishing their cause of action: that the Harvestore did not perform as represented. Pet. App. B-19 n.6, B-15-16. The court found that the facts establishing petitioners' cause of action were not susceptible to concealment because evidence of the moldy and spoiled feed coming from the silo, the unhealthy cows, and the lack of protein savings were on petitioners' own farm, and because Dairy Herd Improvement Association ("DHIA") reports

showing milk production rates and profitability had been sent to petitioners monthly during the entire period they operated the farm. Pet. App. B-15, B-19 n.6. The court further rejected the argument that comments by Harvestore representatives constituted fraudulent concealment because Marvin Klehr himself had testified that these representatives had never attributed the mold, herd health problems, or low milk production to the Klehrs' mismanagement. Pet. App. B-16.

The U.S. Court of Appeals for the Eighth Circuit, reviewing *de novo*, affirmed, finding that petitioners should have discovered the facts constituting the existence, source, and pattern of the injury, and establishing all elements of their civil RICO claim, long before 1987. Pet. App. A-6-7, A-10, A-12, A-15. Under that circuit's civil RICO accrual rule -- the injury and pattern discovery rule -- the claim was found to be time-barred. Pet. App. A-14, A-16. The court expressly considered, and rejected, adoption of the last predicate act rule adopted in *Keystone*, or any variation of that rule, because "such an 'open-ended' standard... was inconsistent with 'the underlying policy of a statute of limitations requiring due diligence on the part of the plaintiff.'" Pet. App. A-16 (quoting *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991)).

The Eighth Circuit also affirmed the district court's finding that the fraudulent concealment doctrine did not apply to toll the limitations period because respondents "did not, and indeed could not, prevent [petitioners] from discovering that [respondents'] promises concerning the virtues of a Harvestore unit did not come to pass." Pet. App. A-13. Finally, the Eighth Circuit affirmed the district court's ruling that any damages suffered during the four years prior to filing did not give rise to a separate cause of action because those damages flowed from the original injury sustained in the

1970s, the silo's failure to operate as represented. Pet App. A-16-17.

### SUMMARY OF ARGUMENT

Instead of creating a special accrual rule for civil RICO claims, the Court should apply to those claims the *same* rule that has traditionally been applied to most federal civil claims. Under that rule, the limitations period for civil RICO claims begins to run when (1) all elements of the civil RICO claim exist, and (2) the plaintiff discovers, or reasonably should have discovered, his injury. Different acts resulting in different injuries to the same plaintiff establish separate causes of action, which accrue separately. Traditional equitable tolling applies to provide additional time to a reasonably diligent plaintiff who is unable to discover the acts or events establishing a civil RICO claim during the limitations period. Pt. I.A.1.

1. This rule resolves the concerns that have divided lower courts. First, a civil RICO action cannot become time-barred before it even exists, because the rule makes clear that the limitations period does not begin to run until all elements of the claim exist. Second, the rule addresses the difficulty under some circumstances of discovering the predicate acts necessary to plead a RICO pattern by providing equitable tolling for diligent plaintiffs for a reasonable period of time. Pt. I.A.2.

2. This rule also better serves the purposes underlying statutes of limitation than the minority rules adopted by some courts of appeals – the last predicate act rule and the injury and pattern discovery rule. It places greater pressure on potential plaintiffs to bring claims while the evidence remains reliable, and provides greater certainty in the conduct of

commercial affairs. Pt. I.B. At the same time, the rule is consistent with the civil RICO statute, which provides a remedy to private plaintiffs only if they suffer “injury,” because it is triggered by that injury rather than by the last predicate act, which may not have injured the plaintiff, or anyone. Pt. I.C.

3. Because the court below found petitioners’ claim time-barred under a rule permitting a civil RICO claim to accrue *later* than the date of accrual under the rule proposed here, petitioners’ claim is necessarily time-barred under the proposed rule. Pt. I.D.

4. As both courts below ruled, the doctrine of fraudulent concealment is not applicable to this case. That doctrine applies only when a defendant’s conduct prevents discovery of facts needed to plead a cause of action. Both courts below held that respondents did not prevent petitioners from discovering the facts establishing a civil RICO cause of action. Pt. II.

### ARGUMENT

#### **I. THE COURT SHOULD APPLY TO CIVIL RICO CLAIMS THE SAME ACCRUAL RULE THAT COURTS HAVE TRADITIONALLY APPLIED TO OTHER FEDERAL CIVIL CLAIMS.**

##### **A. All of the Concerns Troubling the Courts of Appeals Would Be Fully Addressed by Applying the Traditional Federal Accrual Rule to Civil RICO.**

There is no need to cobble together a special accrual rule for civil RICO. The accrual rule traditionally applied to federal



civil claims is also an appropriate rule for civil RICO actions. Under this rule, the limitations period begins to run when (1) all of the elements of a civil RICO claim exist, and (2) the plaintiff discovers, or reasonably should have discovered, his injury. If, at a later date, the plaintiff suffers a different injury by reason of the same pattern of racketeering activity, a separate cause of action accrues when the plaintiff discovers, or should have discovered, that injury. In addition, as is true with respect to other federal civil claims, this rule is subject to equitable tolling in cases where a plaintiff, exercising reasonable diligence, is unable to discover the acts or events that form the basis of a civil RICO claim within the four-year limitations period. In such a case, the limitations period is tolled for the period of time needed by a reasonable person, exercising reasonable diligence, to discover these acts or events and file a claim. The civil RICO accrual rule adopted by a majority of the courts of appeals expressly includes some or all of these elements.

*1. This Rule is Consistent With Accrual Rules Applicable to Other Federal and State Actions.*

The rule of accrual proposed by respondents for civil RICO actions is the rule most frequently applied to other federal claims. The requirement that all elements of the civil RICO claim must exist before the limitations period begins to run is congruous with the accrual rule applicable to every other type of claim, state and federal. It is long-settled law that statutes of limitation do not begin to run before there is "a complete and present cause of action." *Rawlings v. Ray*, 312 U.S. 96, 98 (1941). "[A] right accrues when it comes into existence." *United States v. Lindsay*, 346 U.S. 568, 569 (1954); see also *United States v. Cocoa Berkau Inc.*, 990 F.2d

610, 613 (Fed. Cir. 1993) ("[t]he law is well settled . . . that a claim does not accrue until all events necessary to fix the liability of a defendant have occurred"). Indeed, the background rule in common and statutory law is that the limitations periods begin to run as soon as "the right of action is complete" and the plaintiff has the right to institute a suit. *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875). Accrual rules establishing a different point from which the limitations period begins to run are exceptions. *Id.*

The requirement that the plaintiff must be on notice of his injury before the limitations period begins to run, although an exception to the background rule, is an exception which has generally been adopted with respect to federal claims. See, e.g., *United States v. Mottaz*, 476 U.S. 834, 842-43 (1986) (claim under Quiet Title Act); *United States v. Kubrick*, 444 U.S. 111, 120-22 & n.7 (1979) (claim under Federal Tort Claims Act); *Urie v. Thompson*, 337 U.S. 163, 170 (1949) (claim under Federal Employer's Liability Act); *Exploration Co. v. United States*, 247 U.S. 435, 447 (1918) (bankruptcy fraud claim).<sup>3</sup> Notice of injury is sufficient to prompt a reasonably diligent plaintiff to investigate and discover the

<sup>3</sup> Lower courts and commentators have long recognized the prevalence of a discovery of injury exception for federal claims. See, e.g., *Sprint Communications Co. v. Federal Communications Comm'n*, 76 F.3d 1221, 1226 (D.C. Cir. 1996) ("[i]n federal courts 'the general rule of accrual' . . . is that . . . the limitations period begins to run only when 'the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the action'" (quoting *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 341-42 (D.C. Cir. 1991))); *Golden Gate Hotel Ass'n v. San Francisco*, 18 F.3d 1482, 1485 (9th Cir. 1994) (under federal law, the limitations period accrues when a party knows or has reason to know of the injury which is the basis of the cause of action); Mary S. Humes, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399, 1406 (1990) (noting "the near universal application of the discovery rule of accrual to any Federal cause of action").



remaining elements of the claim. The limitations period provides the time period within which the person who is on notice of injury "may conduct the investigation needed to learn whether he has a legal claim and, if so, who is liable." *Central States Pension Fund v. Navco*, 3 F.3d 167, 171-72 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).<sup>4</sup>

Similarly, the rule of separate accrual for each additional act by a defendant that injures the plaintiff is simply the traditional federal accrual rule. *See State Farm Mutual Automobile Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring) (noting that the separate accrual rule has long been applied in antitrust and § 1983 actions). The separate accrual rule distinguishes between a separate and independent injury caused by an act committed within the limitations period (which may be separately actionable) and continuing damages flowing from an injury sustained as a result of an act committed outside the limitations period (which are not). *Id.*<sup>5</sup> It is therefore not surprising that every

<sup>4</sup> At least two courts of appeals have expressly recognized both requirements in the civil RICO context. *See Grimmer v. Brown*, 75 F.3d 506, 512 (9th Cir. 1996) (civil RICO action accrues when all the elements of a RICO claim exist and plaintiff knows or should have known of the injury which is the basis of the action); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464 (7th Cir. 1992) (civil RICO claim accrues once there is a RICO violation and the plaintiffs knew or should have known they were injured). Every court of appeals has found application of a discovery exception appropriate to civil RICO claims; seven courts of appeals define discovery of injury as the discovery necessary.

<sup>5</sup> *See also DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467 (6th Cir. 1996) (for a separate cause of action to accrue, there must be a new overt act, characterized as "a new and independent act that is not merely a reaffirmation of a previous act" and that "inflict[s] new and accumulating injury on the plaintiff") (quoting *Pace Indust., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987)); *Peck v. General Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990) (overt act by defendant required to restart statute of limitations; focus is on timing of the cause of injury, not the effects of the overt acts); *KAW Valley Elec. Cooperative Co. v.*

court of appeals that has considered the question has confirmed the applicability of the traditional separate accrual rule in the civil RICO context.<sup>6</sup>

Petitioners' reliance on the Clayton Act to suggest a different rule is misplaced. Clayton Act civil actions are governed by the same separate accrual rule as is proposed here. Each act in violation of the Clayton Act that causes a distinct injury to someone constitutes a separate civil cause of action, with a separate accrual period. The continuing

*Kansas Elec. Power Cooperative, Inc.*, 872 F.2d 931, 933 (10th Cir. 1989) (new cause of action accrues "only if acts committed within the limitations period are somehow more than 'the abatable but unabated inertial consequences of some pre-limitations action'" (quoting *Poster Exchange, Inc. v. National Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976)); *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1053 (5th Cir. 1982) (continuation of damages within the limitations period resulting from injurious acts outside the limitations period does not give rise to a new cause of action), *cert. denied*, 459 U.S. 1105 (1983).

<sup>6</sup> *See Grimmer*, 75 F.3d at 513 (holding that there must be a new and independent act, not merely a reaffirmation of a previous act, that must inflict a different injury on the plaintiff); *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1418, *reh'g denied*, 116 S. Ct. 1870 (1996) (confining the separate accrual rule to new and independent injuries); *Cherry v. Diaz*, 991 F.2d 787, RICO Bus. Disp. Guide 8273, 1993 WL 118099, at \*3 n.3 (4th Cir. April 16, 1993) (no separate accrual where plaintiffs had suffered no new injuries which were independent of the original injury) *cert. denied*, 510 U.S. 863 (1993); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465-66 & n.10 (7th Cir. 1992) (explaining that "[u]nder a separate accrual rule, a new cause of action accrues only when there is a new instance of wrongful conduct and a new injury"); *Glessner v. Kenny*, 952 F.2d 702, 707-08 (3d Cir. 1991) ("further injuries" sufficient to revive the limitations period must be "new and independent" and explaining that "the mere continuation of damages into a later period will not serve to extend the statute of limitations"); *Bath v. Bushkin, Gains, Gaines and Jonas*, 913 F.2d 817, 820 (10th Cir. 1990) (*per curiam*) (same); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Fla., Inc.*, 906 F.2d 1546, 1554-55 (11th Cir. 1990) (same); *Klehr*, 87 F.3d at 239 (same).

violation doctrine applied in Clayton Act jurisprudence simply recognizes that each day a group of conspirators refuse to deal, or a monopolist controls the market, they commit new acts in restraint of trade that inflict new injuries on other market participants. See, e.g., *Zenith Radio Corp. v. Hazeltine Corp.*, 401 U.S. 321, 338-39 (1971). Thus, under the separate accrual rule, each such act provides those who are injured with a new cause of action which is subject to the applicable four-year limitations period. In contrast, a fraudulent sale of one defective product, as is alleged here, occurs once — at the time of the sale.<sup>7</sup>

Finally, the equitable tolling doctrine proposed by respondents is also an established element of most federal accrual rules. See, e.g., *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (time requirements for federal claims are “customarily subject to ‘equitable tolling’” (quoting *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 95 (1990))); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (finding Title VII suits subject to equitable tolling); *Bowen v. City of New York*, 476 U.S. 467, 481 (1986) (finding equitable tolling applicable to disability benefit claims); *Honda v. Clark*, 386 U.S. 484, 494 (1967) (finding equitable tolling applicable to Trading With The Enemy Act claims). Under this doctrine the limitations period may be extended for plaintiffs who have notice of injury but, despite acting with reasonable diligence, are unable to discover vital information bearing on the acts or events that constitute the elements of their claims. See *Lampf*, 501 U.S. at

<sup>7</sup> Petitioners’ reliance on the Clayton Act is thus misplaced not because the Clayton Act’s accrual rule is inapplicable to civil RICO actions, but because application of that rule cannot bring their 1993 claims over a fraud allegedly committed in 1974 within the applicable limitations period.

363; *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984). Such plaintiffs are traditionally allowed sufficient time to enable a reasonably diligent plaintiff to discover these acts or events and initiate a lawsuit. See *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996).<sup>8</sup>

Furthermore, the traditional federal accrual rule proposed here is consistent with the accrual rules generally applied to the state law claims based on the same conduct as the civil RICO action. Most states, for example, have adopted an accrual rule for fraud claims in which the limitations period begins to run when the plaintiff knows or reasonably should know that he has been injured, assuming the other elements of the claim are also discoverable.<sup>9</sup> Most states apply a similar accrual rule to products liability claims.<sup>10</sup> Many states also

<sup>8</sup> At least three courts of appeals have suggested that traditional equitable tolling rules are appropriate in civil RICO actions. See, e.g., *McCool*, 972 F.2d at 1465; *Rodriguez* 917 F.2d at 668; *Bankers Trust*, 859 F.2d at 1105.

<sup>9</sup> See, e.g., *Miller v. Lambert*, 467 S.E.2d 165, 171 (W.Va. 1995) (“[w]here a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury . . . .”); *Rumford v. Valley Pest Control, Inc.*, 629 So. 2d 623, 627 (Ala. 1993) (the fraud action “did not accrue until [plaintiffs] discovered the [termite] damage to their house”); *Moorman Mfg. Co. v. National Tank Co.*, 414 N.E.2d 1302, 1314 (Ill. Ct. App. 1980) (“[t]he law is clear in Illinois that a cause of action for misrepresentation does not accrue until the injury is discovered”), *aff’d in part*, 435 N.E.2d 443 (Ill. 1982) (fraud claim dismissed on other grounds).

<sup>10</sup> See, e.g., *Martinez v. Humble Sand & Gravel, Inc.*, 1996 WL 674431, at \*2 (Tex. Ct. App. 1996) (“the limitation period of a tort claim . . . does not begin to run until the injury done to the plaintiff is discovered, or until the plaintiff acquires knowledge of facts which, in the exercise of reasonable diligence, would lead to the discovery of injury”) (slip op.); *Kansas City v. W.R. Grace & Co.*, 778 S.W.2d 264, 268 (Mo. Ct. App. 1989) (“[a] cause of action for negligence or strict liability accrues not ‘when the wrong is done or the technical breach of contract or



apply an equitable tolling doctrine that focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant.<sup>11</sup>

2. *The Traditional Federal Accrual Rule Solves the Potential Problems that Have Troubled the Courts Below.*

The concerns expressed by a number of courts of appeals are fully and fairly answered by applying the traditional federal rule of accrual to civil RICO claims. One of the potential situations that concerned those courts -- that a plaintiff's right of action might become time-barred before it even exists -- cannot occur under the rule proposed here. This is because the clock on a civil RICO claim, as on other federal claims, does not begin to tick until all elements of the claim exist, including the pattern elements.

The other potential situation of concern -- that a plaintiff's right of action might become time-barred despite the plaintiff's diligence in attempting to determine the cause of his injury and who was responsible -- is accounted for by application of the traditional equitable tolling doctrine. Indeed, equitable tolling was fashioned, and has long been relied on, to provide a solution for *precisely* this situation. *Lampf*, 501 U.S. at 363. Thus, a plaintiff who diligently investigates but is unable to discover the acts or events on which his claim is

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duty occurs, but when the damage resulting therefrom is sustained and capable of ascertainment.") (quoting MO. REV. STAT. § 516.100).

<sup>11</sup> See, e.g., *Goldman v. Bequai*, 19 F.3d 666, 672 (D.C. Cir. 1994) ("equitable tolling turns on fact-specific questions as to whether a plaintiff in her situation reasonably should have discovered that she had been injured"); *Ramsey v. Culpepper*, 738 F.2d 1092, 1096 (10th Cir. 1984) (in New Mexico, cause of action based upon fraud and negligence is subject to equitable tolling).

based during the limitations period will not be barred. Instead, the limitations period will be tolled for as long as would be needed for a reasonably diligent plaintiff to discover these facts and file a claim. Equitable tolling thus directs relief at the plaintiff's specific difficulty and fully alleviates it. If the elements of a civil RICO claim prove more difficult to discover than the elements of other federal claims, courts will apply equitable tolling more often than in other types of cases. A unique solution specifically formulated to help civil RICO plaintiffs is not required.

B. *The Traditional Federal Accrual Rule Furthers the Purposes Underlying Statutes of Limitation.*

The application of the traditional federal accrual rule to civil RICO claims properly enforces the right of action Congress created, while also furthering the important "public interest" served by statutes of limitation. *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 136 (1938). As this Court has many times recognized, statutes of limitation are important elements in our system of justice, and are "vital to the welfare of society and are favored in the law." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). "They represent a public policy about the privilege to litigate." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). Limitations periods "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). Equally important, limitations periods represent a consensus that certainty and finality in the administration of society's



affairs, especially in commerce, require contingent liabilities to terminate at a reasonably predictable point in time. *See, e.g., Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975). Finally, limitations periods serve to discourage fictitious claims. *See Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 390 (1868) ("claims which are valid are not usually allowed to remain neglected").

Application of the traditional federal accrual rule to civil RICO actions serves all of the salutary purposes of statutes of limitation. By imposing on an injured plaintiff an obligation to act with reasonable diligence, it encourages civil RICO plaintiffs to pursue their claims promptly. It furthers the interests of the courts and public confidence in our judicial system by relieving courts and juries of the burden of trying questions that are remote in time with the attendant loss of evidence from the death or disappearance of witnesses, destruction of documents or failure of memory. *See Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965); *Missouri, Kan. & Tex. R.R. Co. v. Harriman*, 227 U.S. 657, 672 (1913). The rule also affords a needed measure of stability and security to the business world because it terminates most potential claims four years after the injury reasonably should have been discovered. And it achieves all of these societal interests, not by unfairly punishing innocent plaintiffs, but simply by requiring plaintiffs to act with reasonable diligence once they know, or should know, they have been injured.

Furthermore, application of the traditional federal accrual rule to civil RICO claims permits the courts to be guided by the substantial body of existing law governing the application of this rule in other areas. Apart from utilizing well established common law principles, the traditional rule effectively balances the need to assure that *diligent* plaintiffs

have their day in court, against the legitimate purposes of stability and repose underlying statutes of limitation.

In marked contrast, petitioners' proposed rule is virtually open-ended. A civil RICO claim based on the purchase of a product, for example, could be brought for as long as that product was offered for sale — 10, 20, even 50 years after the purchase. Indeed, placing a lengthy tail on civil RICO claims is precisely petitioners' goal because petitioners themselves waited until 1993 to bring a claim on a 1974 purchase — almost 20 years.

Moreover, under the rule urged by petitioners, they would still not have been time-barred had they waited another 20 years to bring their claim — 43 years after purchasing the silo — so long as respondents continued to sell and advertise the product. For this reason, among others, the Third Circuit's last predicate act rule has been roundly criticized by other courts of appeals. *See, e.g., Rodriguez*, 917 F.2d at 667 (last predicate act rule would allow a "fully knowledgeable plaintiff" at least three or four decades to bring suit if the pattern continues); *Granite Falls Bank*, 924 F.2d at 154 (last predicate act rule inconsistent with underlying policy of statutes of limitation requiring plaintiff to exercise diligence). There is no reason why a plaintiff armed with full knowledge of the injury done to him, and the means to protect himself by seeking legal advice and bringing a cause of action, should be provided an indefinite period of time to bring suit.

Finally, petitioners "retreat[] to that last redoubt of losing causes, the proposition that the statute at hand should be literally construed to achieve its purposes." *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 115 S. Ct. 1278, 1288 (1995) (citation omitted). In other words, petitioners ask this Court to ignore the important public policies furthered by statutes

of limitation, because it is clear that their proposed rule is irreconcilable with these policies.

Petitioners' plea for liberal construction of the statute is unavailing. First, there is no statutory provision relating to accrual to liberally construe. Second, application of traditional statutes of limitation is not inconsistent with a proper interpretation of the civil RICO statute, as this Court clearly determined in *Malley-Duff*. All limitations periods and accrual rules cut off some valid claims, but that alone is plainly not inconsistent with the statute. For example, in *Malley-Duff*, this Court found it appropriate to impose a four-year limitations period on civil RICO claims. Indeed, this Court expressly rejected the alternative that no statute of limitations should apply to civil RICO on the ground that "a federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.'" *Malley-Duff*, 483 U.S. at 156 (quoting *Wilson v. Garcia*, 471 U.S. 262, 271 (1985)).

Petitioners' proposed rule does nothing "to prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) (citations omitted). It permits plaintiffs with full knowledge of the wrong committed against them to be flagrantly dilatory. Such a rule offends the purposes of RICO and the policies of diligence and repose embodied in federal civil statutes of limitation, and should be rejected.

The injury and pattern discovery rule, applied by the Eighth Circuit below, is certainly less open-ended than the rule urged by petitioners, but that rule also is more open-ended than is either necessary or appropriate. The key difference between the traditional federal accrual rule and the injury and pattern discovery rule is the length of time available to a diligent plaintiff *once he has discovered the facts*

*supporting his claim*. Under both rules, a plaintiff who is on notice of injury but has neither actual nor constructive knowledge of the other elements of a RICO claim, despite the exercise of reasonable diligence, is provided additional time to acquire that knowledge and bring a claim. Under the traditional federal accrual rule, such a plaintiff is provided the amount of time that is reasonably necessary to acquire the knowledge and bring the claim. Under the injury and pattern discovery rule, however, after such a plaintiff is reasonably able to discover the facts supporting his claim, he would nonetheless be given an additional four years to bring a claim. This is because, under the injury and pattern discovery rule, the limitations period only *begins* to run when the plaintiff knew, or should have known, of the RICO pattern as well as his own injury.<sup>12</sup>

No legitimate purpose is served by creating an exception to the traditional federal accrual rule to afford a plaintiff who knows he is injured and knows that the injury was part of a pattern of criminal activity more than the time necessary to seek legal advice and file a claim. In its application, the injury and pattern discovery rule requires plaintiffs to be diligent up until the time they learn all they need to learn to file suit, but then inexplicably removes the pressure entirely for an additional four years. Because no purpose is served by

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<sup>12</sup> For example, under the injury and pattern discovery rule, if a plaintiff knows he is injured in year 1, but cannot reasonably discover the pattern until February of year 5, the four-year limitations period begins to run in February of year 5. In contrast, under the traditional federal accrual rule, the four-year limitations period would begin to run in year 1, but the plaintiff would be afforded a reasonable period after February of year 5 to seek legal help and file a claim. Thus, under the injury and pattern discovery rule, the plaintiff would be able to bring suit until February of year 9. Under the traditional federal accrual rule, the plaintiff would have to bring suit in year 5.



permitting plaintiffs four years longer than they need to learn the facts supporting their claim and press that claim in court, and because the additional four years imposes unnecessary costs on the judicial system and on commercial activity, it is a less appropriate choice.

**C. The Traditional Federal Accrual Rule Is Consistent with and Furthers the Purposes of the Civil RICO Statute.**

Application of the traditional federal accrual rule is consistent with the right of action Congress fashioned. It recognizes that, although Congress made a continuing criminal enterprise an element of a civil RICO claim, Congress premised the civil remedy on specific *injuries*. See *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495-96 (1985). The traditional federal accrual rule ensures that injured plaintiffs have an opportunity to investigate and bring civil RICO claims to recover damages caused by RICO violations, because the limitations period does not begin to run until the elements of the claim exist and the plaintiff is on notice that he has been injured, and because the limitations period may be extended when reasonably diligent investigation cannot uncover the facts needed to bring a claim within the four-year period.

At the same time, the rule encourages those plaintiffs, who are in a position to do so, to bring pressure to bear on criminal enterprises to end their criminal activity as soon as

possible by bringing claims for treble damages.<sup>13</sup> This serves the statutory purposes by exposing and deterring RICO violations before *other* parties are injured. Congress provided powerful incentives for plaintiffs to pursue RICO claims in order to encourage them to act, not merely as private individuals, but as private attorneys general. See, *Malley-Duff*, 483 U.S. at 151; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241 (1987); *Sedima*, 473 U.S. at 494. Congress' goal of deterring RICO violations by encouraging this private enforcement mechanism is undermined if private plaintiffs are allowed to be needlessly dilatory in the pursuit of their claims.

Petitioners' argument for application of the criminal RICO accrual rule to private rights of action, Pet. Br. at 26, finds no support in the provisions or structure of the statute, and would disserve its purposes. The criminal RICO accrual rule — which starts the limitations period when the last predicate act in the pattern is committed — is fashioned to serve the terms and purposes of the *criminal* RICO statute. A *criminal* violation of RICO occurs when a person invests in, controls or participates in an enterprise through a pattern of racketeering activity. See 18 U.S.C. § 1962(a)-(c). It is the *pattern* of racketeering activity *alone* that gives rise to criminal liability under RICO, without regard to injury. For these reasons, the courts that have addressed the issue have found that the limitations period for *criminal* RICO runs from the last predicate act. See *United States v. Torres Lopez*, 851

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<sup>13</sup> The separate accrual rule, in which each distinct and independent injury is a separate cause of action, recognizes that a RICO pattern of criminal activity may impose multiple and independent injuries on an individual plaintiff and that these may occur over a period of time, and it provides a mechanism by which that plaintiff may recover treble damages for each such injury. See, e.g., *Bankers Trust*, 859 F.2d at 1103.



F.2d 520, 525 (1st Cir. 1988), *cert. denied*, 489 U.S. 1021 (1989); *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988).

By contrast, these same criminal RICO violations do not give rise to a *private* RICO claim unless and until they cause *injury*. A plaintiff has no private right of action under RICO, and may not seek any damages, unless he is "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Thus, a civil RICO cause of action cannot accrue absent such injury. *Sedima*, 473 U.S. at 495-97. A pattern of racketeering activity alone does not give rise to liability to a private plaintiff. *Id.*

In light of RICO's clear statutory scheme establishing different elements for civil causes of action than for criminal violations, the rule of accrual appropriate to criminal actions is patently inappropriate to civil suits. Rather, the statutory provisions support different accrual rules -- an accrual rule tied to the pattern of activity for criminal RICO prosecutions and an accrual rule tied to the occurrence, and the plaintiff's discovery, of injury for civil RICO lawsuits. As this Court recognized in *Malley-Duff*, statute of limitations rules appropriate to criminal RICO do "not reflect any congressional balancing of the competing equities unique to civil RICO actions or, indeed, any other federal civil remedy." 483 U.S. at 156 (imposing a four-year limitations period for civil RICO actions rather than the five-year period applicable to criminal RICO). Thus, this Court has already noted that the differences between civil RICO and criminal RICO require different *periods* of limitation; those same differences also require different accrual rules.

The last predicate act rule may be appropriate for criminal RICO, which imposes liability solely for the pattern of predicate acts, but it is ill-suited to civil RICO. The civil

RICO provision focuses on the specific injury to the plaintiff's business or property as part of a pattern of criminal activity. Later predicate acts by the same defendant which harm someone else altogether, or harm no one at all, are unrelated to that plaintiff's injury or claim for redress. Reviving the limitations period for each later predicate act is therefore antithetical to the statute's specific purpose of encouraging private parties to actively investigate and punish patterns of criminal activity as private attorneys general. The last predicate act rule urged by petitioners -- rather than encouraging plaintiffs to expose and stop ongoing criminal enterprises -- allows plaintiffs to rest on their claims until four years after the criminal activity has been voluntarily terminated by its perpetrators. Such a rule would be considerably less effective than the traditional federal civil accrual rule in curbing the "serious national problem" that prompted Congress to enact RICO. *Malley-Duff*, 483 U.S. at 151. A rule that does not require a plaintiff to pursue or investigate a possible civil RICO claim once he knows or reasonably should know of his injury is simply inconsistent with Congress' intent to prevent further RICO violations by empowering victims of racketeering activity to bring civil enforcement proceedings as private attorneys general.<sup>14</sup>

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<sup>14</sup> In addition, the traditional federal accrual rule's requirement that the elements of the cause of action must exist before the limitations rule begins to run is more precisely suited to the civil RICO provision than the injury and pattern discovery rule's requirement that the plaintiff must have constructive knowledge of both injury and pattern before the limitations period begins to run. This is because the traditional federal accrual rule applies uniformly to every type of civil RICO action. The civil RICO provision permits a private action if the plaintiff suffered injury by reason of a violation of the criminal RICO provisions. Although the great majority of civil RICO actions are likely to allege a pattern of criminal activity as the requisite violation, pattern is not the only violation enumerated in the statute.

**D. Under the Traditional Federal Accrual Rule,  
and Under the Rules Adopted in Eleven of  
the Courts of Appeals, Petitioners' RICO  
Claim Is Time-Barred.**

The Eighth Circuit and the district court below applied the injury and pattern discovery accrual rule adopted by at least three courts of appeals. That rule is more generous to plaintiffs than either the rule proposed here or any version of the injury discovery rule adopted by the majority of the courts of appeals. Nonetheless, the Eighth Circuit and the district court, applying that more generous rule to the allegations and evidence before them, properly found petitioners' claim to be time-barred. It follows *a fortiori* that petitioners are also time-barred under either of the stricter rules: the traditional federal accrual rule or the injury discovery rule.

The district court below held, as a finding of fact about which the evidence left no room for a reasonable difference of opinion, and on the basis of petitioners' own testimony, that petitioners "should have known shortly after using the Harvestore silo that they were not receiving the represented benefits which induced them to purchase the silo" and that the cause of the alleged deterioration in herd health and decrease in reproductive rates "should have been apparent to Klehr at the latest by the early 1980s." Pet. App. B-11-12.

The Eighth Circuit reviewed *de novo*, and viewing the evidence in the light most favorable to petitioners, concluded that petitioners were on notice of fraud "long before August 27, 1987," Pet. App. A-10, and "that the facts which should have put the Klehrs on notice of a possible cause of action for fraud should also have alerted them to the existence, source,

and pattern of the injury for their RICO claim." Pet. App. A-15. Further, the Eighth Circuit found, based on petitioners' own allegations and testimony, that they "knew or should have known shortly after purchasing the Harvestore that AOSHPI's representations concerning the silo's attributes were simply not coming true and thus should have recognized the existence and source of their injury." *Id.* Finally, based on petitioners' claim that they received numerous promotional materials before they even purchased the silo, the Eighth Circuit determined "they should have known that the misrepresentations were part of a pattern of suspected racketeering activity." *Id.*

Thus, for purposes of the civil RICO claim, both courts found that petitioners knew or should have known of the existence and source of their alleged injury, and that it was part of a pattern of racketeering activity, more than four years before they filed their lawsuit. Pet. App. B-18-19, A-17. Indeed, both courts expressly found that petitioners knew or should have known of both injury and pattern "long before" the four-year cut-off. Pet. App. B-19, A-17.

This case provides "no occasion to disturb the findings of fact by two courts." *Exploration Co. v. United States*, 247 U.S. 435, 445 (1918). All the facts relied on by these two courts were contained in the allegations and deposition testimony of petitioners themselves and fully support the courts' conclusions. Petitioner Marvin Klehr purchased the Harvestore in 1974, based on respondents' representations that oxygen would not contact the feed during storage, that he would therefore not have any moldy or spoiled feed, that his cows would be healthier and provide three to five pounds more milk per cow per day, that he could significantly reduce or eliminate protein supplements in their rations, and that the silo would pay for itself in four to five years. Pet. App. B-2-



3, A-3. He testified that he was an experienced dairy farmer before purchasing the Harvestore and knew that mold and spoilage in feed are caused by the feed's exposure to oxygen and that moldy and spoiled feed is harmful to dairy cows. Pet. App. B-3, A-2-3.

Petitioner Marvin Klehr further testified that he began using the Harvestore in mid-1975 and had noticed mold in the feed removed from the silo as soon as a year later, and then each year thereafter, and discarded loads of spoiled feed during each of these years. Pet. App. B-3-4, A-8. He also testified that shortly after he started feeding his cows from the silo their health deteriorated and they began experiencing theretofore unencountered reproductive problems. Pet. App. B-5-6, B-12, A-8. Petitioner's own testimony also established that he received monthly DHIA records which he claimed showed that neither his milk production nor his profits were increasing, and that he was not able to reduce the amount of protein added to the cows' feed. Pet. App. B-7-8, B-12, B-14, A-5, A-9. Moreover, petitioners claimed that they received 20 pieces of fraudulent advertising through the mail before they purchased the Harvestore, and relied on those advertisements to establish a pattern of predicate acts. Pet. App. B-17, A-15.

Under the traditional federal accrual rule, petitioners' limitations period began to run long before 1989 and their claim is therefore time-barred. All of the elements of their civil RICO claim were in existence by the time they should have discovered their injury. Petitioners knew or should have known that the representations made to them in advertising brochures and various farm magazines were regularly being made to others as early as 1974. And, as both courts below found, petitioners knew or should have known, assuming for these purposes that petitioners' claims are correct, that the representations made to them before they purchased the silo

were false and that their cows were experiencing health problems long before 1989.

Equitable tolling is not available to extend the limitations period here because, as both courts found, the facts supporting their claim were readily available to petitioners on their own farm and in their own DHIA records. Likewise, petitioners may not avail themselves of the separate accrual doctrine. The damages they allege occurred within the limitations period do not derive from a distinct and independent injury giving rise to a separate cause of action, but are rather only continued damages flowing from the initial injury in the 1970s. All of petitioners' damages are the natural and foreseeable consequence of a single injury allegedly caused by the failure of the Harvestore to provide oxygen-limiting storage. Accordingly, if this Court determines that the traditional federal accrual rule applies to civil RICO actions, it should affirm the decision of the court below.

Likewise, if this Court holds that the injury and pattern discovery rule applies to civil RICO actions, it should affirm the decision below, because the injury and pattern discovery rule was the rule applied below. Pet. App. A-14.

Finally, if this Court adopts a stricter construction of the injury discovery rule than is proposed here, it should affirm the decision below based on both the district court's and the Eighth Circuit's findings that petitioners should have discovered their injury and its cause before 1987. Indeed, both courts addressed this question expressly with respect to the state law fraud claim that was also before them. Under the Minnesota accrual rule for fraud, the limitations period begins to run when the plaintiff knew or should have known he was defrauded (*i.e.*, the injury). Pet. App. B-10, A-6-7. Thus, both courts considered when petitioners knew or should have known they were defrauded, and both courts concluded that



petitioners knew or should have known they were defrauded well before August 27, 1987 (the cut-off date for the state fraud claim). Pet. App. B-13, A-10. Furthermore, both courts expressly addressed when petitioners should have discovered their injury in determining whether the civil RICO cause of action was time-barred, and both found that petitioners had discovered or should have discovered their injury long before 1989. Pet. App. B-19, A-17.

Petitioners' claim survives *only* if accrual waits until the defendant commits the final predicate act in the alleged pattern of racketeering activity, and *only* if the plaintiff's knowledge of his injury and of the elements of his civil RICO claim are entirely disregarded. Thus, only if this Court adopts the last predicate act rule -- a rule respondents strongly urge should be rejected, for the reasons discussed above -- is it necessary to remand this case for further proceedings.

Notwithstanding petitioners' attempt to raise, at this late stage, questions about the burden of proof applicable to summary judgment determinations, and about the specific application of the summary judgment standard to the facts of this case, Pet. Br. at 34, these questions are not properly before the Court. These questions were not raised before the court below, or in petitioners' petition for rehearing. Furthermore, they were not included as questions presented in petitioners' petition for *certiorari* to this Court. Thus, under Sup. Ct. R. 14, it is unnecessary for the Court to consider them.

In any event, the lower courts properly placed the burden of proof for summary judgment on the moving party, and did not err in applying the summary judgment standard. Both courts placed the burden of establishing that there was no genuine issue of material fact on respondents. Pet. App. B-10, A-6. Both courts then properly required petitioners to

produce evidence in support of their allegations that the equitable tolling exception to the statute of limitations defense should apply.

In accordance with Rule 56, both courts correctly reviewed all of the facts in the light most favorable to petitioners. Indeed, as discussed above, both courts relied solely on facts asserted by petitioners in either their Amended Complaint or their sworn deposition testimony. Finally, both courts correctly drew inferences from petitioners' asserted facts only when the evidence left no room for reasonable minds to differ, permitting the courts to resolve the issues as a matter of law. Pet. App. B-10, A-6-7. Thus, there is no cause for this Court to review these determinations, even if the questions had been properly raised.<sup>15</sup>

## **II. BOTH LOWER COURTS CORRECTLY FOUND THAT THE DOCTRINE OF FRAUDULENT CONCEALMENT DOES NOT APPLY TO THE FACTS OF THIS CASE.**

The doctrine of fraudulent concealment is not specific to civil RICO, and petitioners do not argue that the rules governing its application to civil RICO should be different from the rules governing its application in any other area of law. This case does not present any unresolved questions regarding the doctrine of fraudulent concealment. It is settled

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<sup>15</sup> In their Opposition to *Certiorari*, respondents raised a question with respect to the Court's jurisdiction. Because of the unusual procedural posture, in which this case was held for *Grimmett v. Brown*, Docket No. 95-1723, before being granted *certiorari*, respondents are not clear whether this Court has ruled on the jurisdictional question. If not, an alternative disposition available to the Court is to dismiss *certiorari* on the ground that the Petition for *Certiorari* was untimely under 28 U.S.C. § 2102(c). See Op. 4-8.

law, reflected in decisions of this Court and every circuit, that the doctrine of fraudulent concealment applies only where the defendant's conduct conceals or otherwise prevents discovery of the facts establishing the cause of action. The trial and appellate courts below applied settled law to the facts in this record and both courts concluded that respondents "did not conceal the facts constituting the cause of action" here. Pet. App. B-15, B-19 n.6, A-12-13. There is no need for this Court to review the application of that settled rule to the facts of this case.

**A. There Were No Acts that Concealed, or Were Capable of Concealing, the Alleged Fraud.**

It is long settled that the doctrine of fraudulent concealment applies only when facts needed to establish a cause of action are actually concealed from the plaintiff. *See, e.g., Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349-50 (1875); *Wood v. Carpenter*, 101 U.S. 135, 143 (1879); *Davis v. Grusemeyer*, 996 F.2d 617, 624 (3d Cir. 1993); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1415 (9th Cir. 1987); *Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Because that threshold showing was not made here, petitioners cannot rely on that doctrine.

In the courts below, petitioners essentially relied on two types of conduct to invoke the doctrine of fraudulent concealment -- pre-sale and post-sale advertisements allegedly misrepresenting the benefits provided by using Harvestore silos, and non-publication of respondents' internal research and development memoranda. Pet. App. B-15, A-12-13. In their brief to this Court, petitioners additionally rely on the largely sealed construction of the Harvestore itself. Pet Br. 6-

7. Because it was not raised in the district court, this fact-based argument is not properly before this Court. In any event, a comparison of the conduct relied upon with the facts needed to establish petitioners' civil RICO claim makes clear that none of this conduct concealed the facts establishing petitioners' claim.

Petitioners needed to establish the following: (1) respondents defrauded them by promising that the Harvestore would provide specific benefits -- namely that the Harvestore, by virtue of its oxygen-limiting abilities, would prevent mold and spoilage of feed, resulting in healthier cows, increased milk production, savings from reduction of protein supplements, and higher profitability sufficient to pay for the silo in 4-5 years; (2) these promises were misrepresentations and were never realized; and (3) the misrepresentations made to petitioners were also made to others, comprising a pattern of fraudulent activity.

The pre-sale advertisements, far from hiding these facts, are critical evidence establishing both the promises made to petitioners and respondents' open and widespread practice of making such promises to others. The post-sale advertisements which, according to petitioner Marvin Klehr, were simply reiterations of the representations in the pre-sale advertisements, J.A. 16-17, 132, 454, also constitute evidence that respondents were engaged in making these same promises to others, even after petitioners informed respondents of their difficulties with moldy feed and herd health.

Furthermore, neither the pre-sale nor the post-sale advertising concealed from petitioners the chunks of mold in the feed discharged from their Harvestore, or the musty smell and dark color of spoiled feed that petitioners regularly discarded. Neither the pre-sale nor the post-sale advertising concealed from petitioners the health problems or



reproductive abnormalities affecting their cows. Neither the pre-sale nor the post-sale advertising concealed from petitioners the amount of protein they added to the daily rations they fed their cows. Neither the pre-sale nor the post-sale advertising concealed from petitioners the amount of milk produced by their cows, or the amount of net income they derived from their dairy business. Pet. App. B-15, A-13. And, finally, neither the pre-sale nor the post-sale advertising concealed from petitioners the admission from respondents' representative that, despite the contrary promises made to the petitioners before they bought the Harvestore silo, they should expect to find mold in feed stored in a Harvestore silo. J.A. 276-77.

Petitioners' reliance on respondents' decision not to publish internal research and development memoranda is similarly unavailing. The decision not to publish did not conceal the factual bases of petitioners' claim — the promises made to petitioners, the contrary results petitioners experienced, or the pattern of promises made to other farmers. Pet. App. A-13.

The semi-sealed construction of the Harvestore also fails to establish fraudulent concealment. The construction of the Harvestore did not conceal respondents' promises to petitioners or other farmers, and did not conceal the visible mold or spoilage in the unloaded feed, the health problems of the cows, protein supplement levels, milk production levels, or net profits. Nor did the construction of the Harvestore prevent petitioners from having samples of the unloaded feed tested for heat damage and nutritional quality, consistent with standard dairy farming practice. J.A. 398-99, 444-45. Further, the construction of the Harvestore proved no impediment once petitioners decided to look inside. Petitioner Marvin Klehr testified that he, without help or special equipment,

was able to open the hatch, cut through the haylage with a chisel, and look at the feed inside the silo. J.A. 315-16.<sup>16</sup>

Moreover, none of the conduct relied upon was even capable of concealing from petitioners the readily observable facts they had at hand on their farm and in the monthly DHIA reports they received, which petitioners contend directly contradicted the representations on which they had relied in purchasing and using the Harvestore. Because petitioners had unfettered access to every fact needed to plead their civil RICO fraud claim, no act of which they complain can be considered an act of fraudulent concealment. Pet. App. B-15-16, A-13.

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<sup>16</sup> Petitioners also relied on a third type of conduct to invoke the doctrine of fraudulent concealment in the courts below that they do not appear to assert before this Court: that respondents' representatives offered farm management suggestions to petitioners. Petitioners no longer appear to maintain that respondents' representatives concealed the alleged fraud suffered by petitioners in this manner. Instead, petitioners' brief alleges more vaguely that respondents' representatives generally made management suggestions to farmers and that this concealed the alleged fraud from farmers generally. Pet. Br. 11. This point may have been included as evidence of a pattern; it is not, however, relevant to establishing fraudulent concealment in this case. In any event, as both courts below found, it is incontrovertible that respondents' representatives did not conceal from petitioners the failure of their Harvestore to fulfill respondents' promises. Petitioner Marvin Klehr testified under oath that none of respondents' representatives ever suggested that the mold, herd health problems or low milk production that he experienced on his farm were due to his mismanagement, rather than the Harvestore. Pet. App. B-16, A-13. Indeed, Marvin Klehr testified that he always understood he was operating the silo in accordance with proper management practices. J.A. 298-99; 303-05.



**B. Petitioners' Failure to Exercise Reasonable Diligence Additionally Precludes Them from Invoking the Doctrine of Fraudulent Concealment.<sup>17</sup>**

The doctrine of fraudulent concealment is available only to plaintiffs who have exercised reasonable diligence. *See, e.g., Bailey*, 88 U.S. at 349-50 (applying the doctrine only when there has been no negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud); *Wood*, 101 U.S. at 140 (holding plaintiff to a stringent pleading requirement in fraudulent concealment case "so that the court [could] clearly see whether, by ordinary diligence, the discovery might not have been before made").

Only one circuit has dispensed with the diligence requirement. *See, e.g., Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir. 1975). In urging this Court to adopt the Seventh Circuit's rule, petitioners fail to acknowledge that every other circuit that has addressed the issue has held that the doctrine of fraudulent concealment is available only to reasonably diligent plaintiffs. *See, e.g., J. Geils Band Ben. Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1254 (1st Cir.) (the fraudulent concealment doctrine requires that there be a showing of reasonable diligence), *cert. denied*, 117 S. Ct. 81 (1996); *Grimmett*, 75 F.3d at 514 ("[T]he doctrine of fraudulent concealment is invoked only if the plaintiff both pleads and proves that the defendant actively misled her, and that she had neither actual nor constructive knowledge of the facts constituting her cause of action despite her due diligence");

<sup>17</sup> Because petitioners did not make a threshold showing of concealment (*see* Point II.A. *supra*), it is not necessary for this Court to reach this point in order to affirm the lower courts' rejection of petitioners' fraudulent concealment claim.

*Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995) (to invoke the fraudulent concealment doctrine, a plaintiff must demonstrate that he failed to discover the concealed facts within the statutory period, despite the exercise of due diligence); *Davis*, 996 F.2d at 624 n.13 (to invoke the fraudulent concealment doctrine, plaintiff must show that his ignorance of the cause of action is not attributable to his lack of diligence); *Campbell v. Upjohn Co.*, 676 F.2d 1122, 1128 (6th Cir. 1982) (specifically rejecting a standard excusing diligence); *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 694 (10th Cir.) (same), *cert. denied*, 454 U.S. 895 (1981).<sup>18</sup>

The Eighth Circuit also follows the rule that the doctrine of fraudulent concealment is available only to diligent

<sup>18</sup> Petitioners' reliance on the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979), and the D.C. Circuit's decision in *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480 (D.C. Cir. 1989), to suggest a more substantial split among the circuits is misplaced. *Riddell* makes clear that the D.C. Circuit rule is the normal rule: the doctrine of fraudulent concealment is available only to diligent plaintiffs. Indeed, *Riddell* expressly states that "if the jury finds fraudulent concealment, defendants will have the burden, if the statute is not to be tolled, of proving that plaintiff could have discovered the cause of action if he had exercised due diligence." *Id.* at 1491. (internal quotations omitted). Furthermore, although the Second Circuit in *Robertson* did follow the Seventh Circuit's rule, the Second Circuit's more recent opinions make clear it has abandoned that view, as the Seventh Circuit itself acknowledged in *Wolin v. Smith Barney Inc.*, 83 F.2d 847, 852 (7th Cir. 1996). *See, e.g., Stone v. Williams*, 970 F.2d 1043, 1048-49 (2d Cir. 1992) ("Fraudulent concealment does not lessen a plaintiff's duty of diligence; it merely measures what a reasonably diligent plaintiff would or could have known regarding the claims"); *see generally, Dodds v. Cigna Securities, Inc.*, 12 F.3d 346, 352 (2d Cir. 1993) (no tolling for fraudulent concealment where plaintiff has constructive notice of injury and would have, with diligence, discovered the facts supporting her claim); *Golden Budha Corp. v. Canadian Land Co. of America*, 931 F.2d 196, 201 (2d Cir. 1991) (in parallel state law claim, plaintiff's due diligence is "essential element for the applicability of the doctrine").

plaintiffs. Thus, the court below explained that petitioners' "lack of diligence precludes us from tolling the statute of limitations due to fraudulent concealment." Pet. App. A-14. In any event, application of even the Seventh Circuit's rule in *this* case would yield the same outcome. This is because even the Seventh Circuit's rule withholds the benefits of the doctrine of fraudulent concealment from plaintiffs who *have* discovered the facts establishing their claims. *See Sperry v. Barggren*, 523 F.2d 708, 711 (7th Cir. 1975) (where active concealment is found, "the statute is tolled until actual discovery"). Here, by their own admission, petitioners had actual knowledge in the 1970s that the feed they stored in the Harvestore was not free from mold and spoilage and was not sufficiently higher in protein that they could dispense with expensive protein supplements. J.A. 272-73, 279-81, 283-85, 308-11, 443-45. Further, they knew this was contrary to the representations that induced them to purchase the Harvestore, and that the representations made to them had been made, and continued to be made, to many other farmers. Petitioners therefore had actual knowledge of the facts constituting their civil RICO claim.

Thus, this case presents no opportunity for the Court to revisit the doctrine of fraudulent concealment. None of the conduct petitioners complain of actually concealed petitioners' cause of action from them, or was even capable of doing so. In addition, petitioners had actual knowledge of facts sufficient to establish their cause of action long before 1989, four years before they filed the claim. No rule proposed by petitioners would justify applying the doctrine of fraudulent concealment to this case.

## CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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In the  
**Supreme Court of the United States**  
October Term, 1996

MARVIN KLEHR AND MARY KLEHR,  
*Petitioners,*

v.

A.O. SMITH CORPORATION AND  
A.O. SMITH HARVESTORE PRODUCTS, INC.,  
*Respondents.*

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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#### INTRODUCTION

Respondents, A.O. Smith and A.O. Smith Harvestore Products, Inc. (collectively "AOSHPI"), offer no valid reason why a jury should not hear Petitioners' claim for the injuries they suffered as a result of AOSHPI's continuing pattern of RICO violations. Claiming that Marvin and Mary Klehr (the "Klehers") were too slow to recognize that it was their silo and not their farming practices that caused their damages, AOSHPI advocates a statute of limitations accrual rule which it says should bar the Klehrs' claim. It bases its rule on "staleness" concerns even though its RICO violations continue and the passage of time has not impaired any necessary evidence. Rather than cut off the Klehrs' claim, this Court should adopt the "last predicate act" accrual rule used for criminal RICO violations (hereinafter, the "criminal" rule) because it is consistent with both the continuing nature of AOSHPI's RICO violation, upon which the Klehrs' claim is based, and Congress' objectives in enacting the RICO statute.

Even if this Court adopts a limited accrual rule which focuses on injuries caused by each individual predicate act rather than the RICO violation, a jury should consider whether the Klehrs "should have known" of their injuries. Contrary to AOSHPI's contention, the lower court committed fundamental legal error when it placed the burden of disproving AOSHPI's limitations affirmative defense on the Klehrs. Because a jury could reasonably conclude that AOSHPI failed to prove that the Klehrs knew or should have known, before the end of the limitations period, that the "sealed" Harvestore silo was insidiously destroying their cattle, the Klehrs are entitled to try their claims.

In addition, even under AOSHPI's limited "injury-discovery" rule, the case must be remanded and the trial court instructed to consider whether AOSHPI's continuing acts of concealment prevented the Klehrs from discovering that AOSHPI's fraud caused new and accumulating injuries in subsequent years. Whether based of "separate accrual" or "fraudulent concealment," AOSHPI's continuing misrepresentations and other predicate acts tolled the statute of limitations until the Klehrs discovered their injury.

## **ARGUMENT**

### **I. THE CRIMINAL ACCRUAL RULE PROMOTES RICO'S PURPOSES AND PROVIDES COURTS AND LITIGANTS WITH A CLEAR AND PREDICTABLE STANDARD.**

In its eagerness to have the Court adopt an accrual rule favoring RICO defendants, AOSHPI emphasizes the ease of borrowing a "traditional"<sup>1</sup> rule. But tailoring an accrual rule to advance specific Congressional policies and reflect the unique characteristics of a federal claim, such as RICO, poses no great difficulty. Accordingly, this Court has in the past resisted similar invitations from advocates of mechanical approaches to statute of limitations questions. See *Urie v. Thompson*, 337 U.S. 163, 169 (1949) ("mechanical analysis of the 'accrual' of petitioner's injury ... can only serve to thwart the congressional purpose"); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 557-58 (1974) (proper test is whether proposed rule "in a given context is consonant with the legislative scheme"); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317-18 (1965) (resolution of statute of limitations issue should be based on Congress' basic policy objectives in enacting the law). Indeed, in *Havens Realty Corp. v. Coleman*, this Court warned that to ignore the nature of the claim itself in determining an accrual rule "only undermines the broad remedial intent of Congress." 455 U.S. 363, 380 (1982) (holding that a last act rule applies to continuing violations of Fair Housing Act).<sup>2</sup>

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<sup>1</sup>As noted in section I.B., the "injury-discovery" rule AOSHPI proposes is not the rule "traditionally" applied to injuries caused by pattern offenses. This rule is particularly ill-suited to RICO as it allows a RICO violator to escape liability for a portion of the harm his continuing criminal pattern acts cause.

<sup>2</sup>*Amici*, American Council of Life Insurance and American Honda Motor Company, Inc. ("Honda"), brush aside RICO policy and claims that Congress intended the statute of limitations to run from "injury." This argument is based on the flawed premise that this Court borrowed the Clayton Act limitations period in *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143

Not surprisingly, the rule AOSHPI proposes primarily promotes repose for RICO defendants and does little to further RICO's purposes. Its uneasy fit with the structure of RICO claims results in difficult practical application problems for both courts and litigants. Ultimately, this narrow rule does little to punish or deter long-term criminal enterprises, allowing them to absorb the impact of RICO claims as a cost of "doing business."

In contrast, the criminal accrual rule not only fulfills RICO's purposes, but serves the courts' and litigants' interests in adoption of a clear and certain limit to liability. Although AOSHPI argues that the criminal rule creates long-term exposure to RICO liability, this long-term exposure only reflects Congress' efforts to combat long-term criminal conduct and exists, under the criminal rule, only as long as criminal conduct persists. The criminal accrual rule not only reduces uncertainty; it is consistent with the continuing nature of RICO violations, promotes RICO's purposes by bringing the full weight of the civil claims associated with a criminal pattern to bear on a criminal enterprise, and fully compensates victims of criminal activities that continue into the limitations period.

#### **A. Federal Courts Apply a "Last Act" Accrual Rule For Injuries Caused by Continuing Patterns or Practices.**

Insofar as "tradition" has a role in choosing an appropriate accrual rule, following tradition here leads to adoption of the criminal rule. Although AOSHPI relies heavily on a "tradition" of commencing the statute of limitations from the date injury occurs, it eventually abandons its own argument. Based on a case decided not long after the Civil War, it first argues that allowing the statute of limitations to commence at some point other than "accrual"<sup>3</sup>

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(1987), because it found that Congress intended that it do so. *Honda Br. 4*. As Justice Scalia pointed out in his dissent, this claim is untenable because, at the time RICO was enacted, the Court had never "borrowed" a Federal statute of limitations. See 483 U.S. at 167 & n.4 (Scalia, J., dissenting).

<sup>3</sup>Here the term "accrual" describes the point at which a claim first becomes viable. As AOSHPI notes, at one time the statute of limitations always commenced to run from that point. See *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875). Courts now rely on policy to choose other crucial dates to serve as the point from which the statute of limitations should run.



would be exceptional. See Resp. Br. 11 (citing *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875)). Even AOSHPI acknowledges, however, that 125 years of progress have so changed the law that in modern times a variety of accrual rules exist. See, e.g., *United States v. Kubrick*, 444 U.S. 111, 122 (1979) (claim accrues when plaintiff knows of injury and its cause); *Urie*, 337 U.S. at 170 (statutes of limitation "conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights"). Among these rules is the federal "last act" rule, similar to the criminal rule proposed here, for claims based on continuing violations of a federal statute constituting a "pattern or practice" of unlawful conduct continuing into the limitations period. See, e.g., *Havens Realty*, 455 U.S. at 380; *Hukkanen v. International Union of Operating Eng'rs*, 3 F.3d 281, 285 (8th Cir. 1993) (statute of limitations on Title VII violation begins to run upon the last occurrence of discriminatory practice); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989) (commencing limitations at last act in pattern under Title VII is "a general principle" of our law); *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1129 (3d Cir. 1988); *Held v. Gulf Oil Co.*, 684 F.2d 427, 430 (6th Cir. 1982) (employment discrimination). As these cases demonstrate, consideration of "tradition" favors adoption of the criminal rule here.

### 1. The Criminal Rule Promotes the Interests of Legitimate Businesses.

AOSHPI contends that adoption of the criminal rule will harm legitimate businesses by exposing them to RICO claims. Congress' deliberate enactment of RICO so that "legitimate" businesses generating profits through patterns of criminal activity would be required to disgorge their "ill-gotten gains" makes AOSHPI's concern irrelevant. *United States v. Masters*, 924 F.2d 1362, 1369 (7th Cir.), cert. denied, 500 U.S. 919 (1991). By specifically including long-term patterns of mail and wire fraud, which

Although these dates are not technically dates of "accrual," the courts use the term "accrue" to refer to the time the court has decided, as a policy matter, that the statute of limitations should commence to run. See, e.g., *United States v. Kubrick*, 444 U.S. 111, 121-22 (1979).

AOSHPI and its amici term "garden variety" business conduct, within the reach of the statute, Congress directed that fraud should not constitute "business as usual" at American companies.<sup>4</sup> These operations not only provide funds to organized crime syndicates, but they also unfairly hurt legitimate businesses competing with wrongdoers. In this case, for example, AOSHPI's fraud harmed not only the Klehrs, but also manufacturers of other silos. Because RICO can help to eliminate such unfair competition, legitimate businesses should favor RICO not fear it. See Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 Minn. L. Rev. 827, 827-28 (1987) (observing that antitrust and securities laws which are today viewed as essential to maintaining free competition and marketplace integrity, were once, like RICO, opposed by the business community). The criminal accrual rule will, in the final analysis, benefit business.

### 2. The Nature of RICO Claims Favors Adoption of the Criminal Rule.

AOSHPI argues that the criminal rule does not "fit" civil RICO because a civil plaintiff must prove an additional element—injury—in order to recover. This argument is without merit because it is the existence of the "pattern" element—which both civil and criminal RICO share—which courts have uniformly held make the rule appropriate in the criminal context. See *United States v. Starrett*, 55 F.3d 1525, 1544 (11th Cir. 1995), cert. denied, 116 S. Ct. 1335 (1996). The arguments for repose and against staleness apply equally to criminal and civil defendants. Indeed, the potential for criminal liability is far more onerous than the potential for civil liability. Yet, courts have not felt it unjust that the statute of limitations for criminal RICO commences when criminal acts end. Moreover, the existence of continuing criminal

<sup>4</sup>RICO's definition of "enterprise" "include[s] both legitimate and illegitimate enterprises within its scope." *United States v. Turkette*, 452 U.S. 574, 580 (1981); see 18 U.S.C. § 1961(4). "Congress for cogent reasons chose to enact a general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248 (1989).



exposure suggests that a RICO defendant will shoulder no greater burden if he must respond to parallel civil claims.<sup>5</sup>

### **3. The Criminal Rule Is Consistent With Statute of Limitations Policies.**

#### **a. The Rule Does Not Promote Lengthy Limitations Periods.**

Although AOSHPI complains that the criminal rule may expose defendants to suit for lengthy periods, the potential length of exposure to claims is a function of the statute itself, not the criminal accrual rule. Congress provided that the predicate acts in a pattern may be separated by as much as ten years. *See* 18 U.S.C. § 1961(5). Congress also defined "pattern" in a way that includes all related predicate acts regardless of the length of time they continue. Under the criminal accrual rule, however, a defendant may avoid long-term exposure simply by stopping further criminal activity, knowing that four years later, its liability will end.

The "injury-discovery" rule is more uncertain and open-ended than the criminal rule. Under the "injury-discovery" rule, a claim does not accrue until plaintiff discovers or ought to discover her injury and the claim may be equitably tolled until the plaintiff discovers or ought to discover the RICO pattern. Since all of the other predicate acts in the pattern may be directed against someone other than plaintiff, she may be unable to discover the facts constituting the pattern for many years, and certainly long after any wrong-doing has ceased. *Keystone*, 863 F.2d at 1132 (in multiple victim cases, each victim may be unaware for many years that her injury is part of a pattern rather than an isolated event). Under

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<sup>5</sup>There is at least some evidence that Congress looks favorably on applying a uniform limitation period to civil and criminal claims. A 1995 amendment to RICO curtails securities violations as predicate acts, permitting claims based on securities violations only against a person convicted of securities fraud. The limitations period "start[s] to run on the date on which the conviction becomes final." 18 U.S.C. § 1964(c) (emphasis added). Congress believes that civil plaintiffs with disfavored securities-based claims should, at the very least, be permitted to bring civil RICO claims after a criminal conviction. The Court should not deny the great majority of civil RICO plaintiffs the same opportunity to bring civil claims by adopting disparate civil and criminal accrual rules.

AOSHPI's rule, a defendant can be exposed to claims relating to wrongdoing that was abandoned many years earlier. Thus, a defendant's legitimate interest in certainty is better served by the criminal accrual rule than the "injury-discovery" rule.

#### **b. The Criminal Rule Does Not Require the Court to Try "Stale" Claims.**

The criminal accrual rule is consistent with underlying statute of limitations policies intended to protect defendants. Limitations periods are designed to prevent fraud where the lapse of time has destroyed or impaired evidence which would defeat the claim. *Exploration Co. v. United States*, 247 U.S. 435, 447 (1918). This "staleness concern disappears," however, where continuing violations are the basis of the action. *Havens Realty*, 455 U.S. at 380.

Similarly, the criminal rule does not violate limitations policies promoting repose. Repose is appropriate only in "compelling circumstances" where defendants have earned the right to put their earlier wrongdoing behind them. *Wilson v. Garcia*, 471 U.S. 261, 271 (1985). These compelling circumstances simply do not exist where wrongdoing continues. *See Taylor v. Meirick*, 712 F.2d 1112, 1118-19 (7th Cir. 1983).<sup>6</sup>

The facts of this case clearly illustrate why statute of limitations policies play no role in an action based on an ongoing RICO pattern. Here, AOSHPI has no real "staleness" concern; it has not pointed to a single fact which renders the Klehrs' claim "stale" or difficult to try in any respect. AOSHPI can claim no surprise; it tries similar claims on a continuing basis and has gathered such evidence as is available to defend itself from potential civil and punitive damages. *See, e.g., Kronebusch v. MVBA Harvestore Sys.*, 488 N.W.2d 490 (Minn. Ct. App. 1992).

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<sup>6</sup>Where there is actual prejudice from a plaintiff's delay in bringing suit, the court can apply equitable principles on a case by case basis to afford relief. *See Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 437 (1965) (Douglas, J., concurring) ("long-established federal rule of laches" is "uncomplicated, uniform, and directly responsive to the problem" of prejudice caused by plaintiff's delay in bringing suit); *see also Occidental Life Ins. Co. of Cal. v. E.E.O.C.*, 432 U.S. 355, 373 (1977).

Finally, AOSHPI, which continues to violate the Act, has not earned repose. In short, no policy underlying a statute of limitation is served by depriving the Klehrs of their right to try their RICO claim.

**B. AOSHPI's "Injury-Discovery" Rule Is Inconsistent With RICO's Structure and Policy.**

**1. The "Injury-Discovery" Rule Is Not a Traditional Rule.**

Although AOSHPI tries to wrap its "injury-discovery" rule in the cloak of tradition, its effort to mask the rule's novelty, particularly as applied to RICO, fails. First, AOSHPI ignores the continuing nature of RICO violations. As a result, it fails to note the cases that apply a different rule—a last act rule—where the injury is the result of a continuing pattern of violations of federal statute. *See, e.g., Havens Realty*, 455 U.S. at 380-81.

Second, unlike the criminal accrual rule, the "injury-discovery" rule defies tradition by dispensing with the discovery requirement for one of the core elements of the RICO claim: pattern. AOSHPI's novel approach to the statute of limitations starts the limitations period running before a plaintiff has sufficient information about the claim.<sup>7</sup> Thus, the rule encourages, indeed requires, a plaintiff to commence an action without the necessary facts, increasing the likelihood that the plaintiff's claim may fail to meet Rule 9 pleading requirements or that the plaintiff's action will be settled before she has even discovered her RICO claim.

AOSHPI's rule has an even more troubling defect: it creates a point of accrual that may be undeterminable. Under the rule, a party may have no RICO claim at the time he learns of his injury because the defendant's other predicate acts may not yet form a pattern. That party's claim later springs to life, according to AOSHPI, when the RICO pattern element has been developed. Because a pattern, by definition, is a series of related acts, however,

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<sup>7</sup>AOSHPI's suggestion that equitable tolling should stand in for discovery of the pattern element does not soften the harsh effect of its rule. If substituting a tolling rule for discovery of the facts of the claim were fair, the court would substitute tolling for the discovery rule in every case. *Cf. Urie*, 337 U.S. at 169-71.

the pattern must necessarily *first* arise with the first act in the series. If plaintiff is injured by that first act, the limitation period under AOSHPI's injury-discovery rule will run from discovery of the injury and plaintiff's claim may be barred before it can be brought. *See Keystone*, 863 F.2d at 1134.

It does not solve this problem to say that the limitations period will run for such plaintiffs from the time of the second, third or any other arbitrary predicate act in the pattern. This will only place "accrual" at some nebulous point over the course of the pattern that is, by its very nature, undefinable. In later litigation over the timeliness of the claim, the defendant will always claim that the pattern was born with the second act, and the plaintiff will claim that the pattern was born when defendant committed some later predicate act. A court will be unable to resolve this controversy on a principled basis because predicate acts do not "become" patterns at the time defendant commits any particular act in the pattern. *Cf. H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989). Thus, under this interpretation of AOSHPI's rule, there will be no discrete point from which the four-year limitations period will run. This fundamental inconsistency illustrates the ill fit between AOSHPI's injury-discovery rule and RICO's structure.

**2. The "Injury Discovery" Rule is Inconsistent With RICO's Purpose To Eradicate Pattern Crime.**

AOSHPI's "injury-discovery" rule also interferes with RICO's effectiveness against pattern crime because it dilutes a RICO defendant's exposure to damages.<sup>8</sup> RICO's powerful measures are intended to attack racketeers who "'drain[] billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption.'" *United States v. Turkette*, 452 U.S. 574, 588 (1981) (quoting 84 Stat. 922 (emphasis added)). As the Senate Report on RICO noted: "an attack must be made on their source of economic power itself, and the attack must take place on

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<sup>8</sup>*See also* 116 Cong. Rec. 35199 (1970) (remarks of Rep. Rodino) ("a truly full-scale commitment to destroy the insidious power of organized crime groups"); *id.* at 35300 (remarks of Rep. Mayne) (organized crime "must be sternly and irrevocably eradicated").



all available fronts." S. Rep. No. 91-617, at 79 (1969). The aim of RICO's civil remedies is to "divest the association of the fruits of its ill-gotten gains." *Turkette*, 452 U.S. at 585.

AOSHPI asks this Court to adopt an accrual rule which will undermine RICO's tough measures by requiring RICO defendants to divest only a portion of their "ill-gotten gains" even if their criminal activity extends into the limitations period. Congress' objectives would be largely thwarted by a rule of accrual that permits RICO offenders to pocket profits from all but a small portion of a long-term scheme involving many victims. RICO would become a mere duplication of ineffective existing state remedies. Undermining the effectiveness of RICO's civil remedies would thereby create an incentive to commit fraud by making the expected penalty less than the anticipated gain. If criminal enterprises can limit their exposure as AOSHPI suggests, they would be able to plan for and adjust their liability as a cost of doing business. By weakening RICO's power to economically disrupt criminal enterprises, the "injury-discovery" rule would "chloroform" RICO, rendering it ineffective against "legitimate" businesses and criminal enterprises alike.<sup>10</sup>

The dilution of RICO's civil remedies in the lower courts has allowed AOSHPI itself to absorb the impact of civil claims—even punitive damages—without seeming effect. Because farmers have been slow to realize they have been injured, due to the nature of the

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<sup>9</sup>The then-future Justice Felix Frankfurter criticized Wall Street's reaction to New Deal securities legislation in such terms. Letter from Felix Frankfurter to Henry Stimson (Dec. 19, 1933), reprinted in Seligman, *The Transformation of Wall Street* 79 (1982).

<sup>10</sup> The suggestion that "legitimate" businesses have been harassed by "garden variety" claims dressed in RICO clothing is grossly exaggerated in any event. See Goldsmith, *supra*, at 839. Review of the claims that have been found to be time-barred under the existing narrow accrual rules confirms that they were not "garden variety" commercial claims. They involved serious criminal acts. *Id.* at 839 n.54. Moreover, just as the Court may not properly consider the fact that an appropriate accrual rule may bar some good claims, it may not properly consider the fact that an appropriate accrual rule may not bar some bad ones.

fraud and its concealment, AOSHPI has been able to continue reaping the profits from marketing its product, confident that it can absorb the cost of the lawsuits that are periodically filed against it. This Court should not assist AOSHPI in its effort to reduce RICO from a major weapon in the war on criminal organizations to a minor irritant on the road to ill-gotten gain. Cf. *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993) (liberal construction clause "seeks to ensure that Congress' intent is not frustrated"); *Turkette*, 452 U.S. at 587 (the Court is without authority to restrict RICO).

### C. This Court is Not Bound to "Borrow" Accrual Rules.

Relying on *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 362 n.8 (1991), amici Honda argues that having borrowed the Clayton Act's limitations period, this Court must adopt the Clayton Act "accrual" rule as well. *Lampf*, however, held only that a court must adopt any express limitations provision the statute of origin contains. See *id.* at 359. Furthermore, *Lampf* did not address the question of "accrual." This Court does not "borrow" accrual rules; it determines accrual based on its own evaluation of policy. See, e.g., *Urie*, 337 U.S. at 169-71 (tort claim under FELA accrues upon manifestation of injury).

In any event, the fundamental differences between RICO and the Clayton Act would necessarily lead to different conclusions about when claims under each statute "accrue." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967) (cautioning against "the hazards inherent in attempting to define for all purposes when a 'cause of action' first 'accrues.'"). Section 1964(c) provides that one who is injured "by reason of a violation of section 1962 may sue."<sup>11</sup> One does not violate § 1962(c) by committing a single predicate act. Rather, § 1962(c) makes it illegal to "conduct or participate . . . in the conduct of [an] enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (emphasis added). Because RICO's focus on the pattern element as the core of the violation is different from the Clayton Act's focus on discrete

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<sup>11</sup>"Logic and precedent dictate that the starting point in every case involving construction of a statute is the language itself." *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978) (citation omitted).



violations, the meaning of "accrual" as applied to each claim is different. See *Keystone*, 863 F.2d at 1135. Accordingly, amici's argument, carried to its logical conclusion, leads to adoption of the criminal rule.

**D. The Criminal Rule Has None of the Application Problems Which Characterize AOSHPI's Rule.**

The criminal rule is superior to AOSHPI's rule because it may be consistently and predictably applied. The "injury discovery" rule is, in contrast, a prescription for litigation. In applying the "injury discovery" rule, courts must first determine when the plaintiff knew or should have known of her injury. In addition, the court must determine when the "pattern" first came into being. As noted above, this inquiry will frequently be unresolvable. Even then, if a plaintiff seeks the protection of the equitable tolling doctrine, the court will need to decide when a plaintiff "should have known" of the facts constituting the pattern. This will be difficult because there may be no perceptible "pattern" after the second act, or even the third or fourth. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) ("proof of two predicate acts of racketeering, without more, does not establish a pattern"). The parties will not know, until they have litigated these preliminary issues, whether the RICO claim on the merits will proceed. The creation of this collateral litigation is antithetical to the certainty a statute of limitations should create. See *Wilson*, 471 U.S. at 272.

Additional uncertainty surrounds adoption of the "separate accrual" rule which is a necessary component of the rule AOSHPI promotes. Multiple similar injuries, spread over time, frequently result from the very nature of a RICO violation. See *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1103 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989). The separate accrual rule, which theoretically answers the multiple injury question, is extremely complex and difficult for courts to apply. See *Honda Br. 9-14*.<sup>12</sup>

<sup>12</sup>AOSHPI argues that the Eighth Circuit properly applied the "traditional" separate accrual rule, which it claims requires as its basis an act committed within the limitations period. Resp. Br. 12-13. This formulation of the rule is patently inconsistent with the discovery rule AOSHPI proposes and the majority of courts have rejected it. See, e.g., *Bingham v. Zolt*, 66 F.3d 553 (2d

More importantly, requiring plaintiffs to bring multiple actions for recovery of damages for separate injuries caused by continuing pattern crime is wasteful and unnecessary. Cf. *Taylor*, 712 F.2d at 1118-19 (Posner, J.).

In contrast, the court's experience with application of the criminal rule has been uniformly successful; few criminal cases raise the statute of limitations issue. Indeed, one court called the "last predicate act" rule "the most trustworthy and predictable triggering rule . . . we have." *United States v. Vogt*, 910 F.2d 1184, 1197 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991). Because the criminal accrual rule provides clear and definite standards which reduce litigation, allows plaintiffs to avoid multiple actions, and resolves issues relating to pattern activity in a single action, it is the most practical rule for RICO litigation. In addition, it enhances RICO's effectiveness as a tool against the long-term pattern crime which drains "billions" from the economy and fully compensates victims of RICO violations. Accordingly, the Klehrs ask that the Court adopt the criminal rule and reverse the judgment below.

**II. THE EIGHTH CIRCUIT IMPROPERLY RESOLVED A JURY ISSUE.**

**A. The Eighth Circuit Improperly Placed the Burden of Proof on the Klehrs.**

If this Court were to adopt AOSHPI's narrow, injury-based rule, the question whether the rule was properly applied to the facts

Cir. 1995), *cert. denied*, 116 S. Ct. 1418 (1996). Instead, these courts hold that a claim accrues when a plaintiff discovers or should discover each new injury even if the act which caused the damage occurred outside the limitations period. Based on the separate accrual rule used by courts employing an "injury-discovery" accrual rule, later predicate acts must be included in the determination whether the Klehrs knew or should have known of the accumulating damage. Even under the Clayton Act rule, such continuing acts restart the limitations period. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968). That the damage was not qualitatively different in kind is not relevant if the damage was proximately caused, at least in part, by later predicate acts. See *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (common law principles of proximate cause apply to RICO claims).

in this case would remain. AOSHPI contends that the Eighth Circuit's recitation of the summary judgment standard somehow overcomes its clear error in placing the burden of disproving the statute of limitations affirmative defense on the Klehrs.<sup>13</sup> AOSHPI is mistaken. The court cannot properly apply the summary judgment standard without knowing which party bears the burden of proof on the issue. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (court must view the evidence "through the prism of the substantive evidentiary burden"). This is so because the evidentiary threshold for obtaining summary judgment differs based on which party bears the burden of proof. See *Celotex*, 477 U.S. at 325. Thus, the misapplication of the burden of proof at the summary judgment stage is a fundamental error which requires reversal.

**B. The Klehrs' Failure to Discover That the Harvestore Damaged Their Feed Was Reasonable.**

AOSHPI attempts to weave an argument from the irrelevant evidence that AOSHPI exaggerated the benefits of Harvestore ownership. AOSHPI even recharacterizes the Klehr's claim: at page 33 of its brief, it suggests that the Klehrs were required to prove that AOSHPI "defrauded" them by promising that the Harvestore would provide "specific benefits." Of course, none of this is relevant, as the Klehrs do not base their claims on mere disappointed expectations. See *Jt. App. 13* (Amended Complaint).<sup>14</sup>

<sup>13</sup>AOSHPI argues that this Court should not disturb the "findings of fact" below. In the case it cites, *Exploration Co.*, 247 U.S. 435, the courts below had affirmed findings of fact after trial on the merits. In sharp contrast, the court in this case did not "find the facts" but ordered summary judgment against the Klehrs. Thus, review by this Court is de novo. See *Eastman Kodak, Inc. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992).

<sup>14</sup>AOSHPI cites to certain scientific studies, not in the record below, to support the contention, not made below, that Harvestore silos work as represented. See *Resp. Br. 5* n.2. First, this claim is improperly based upon matters not part of the record. As such, it should be disregarded. See, e.g., *Whitcotton v. Secretary of Health and Human Servs.*, 81 F.3d 1099, 1105 (Fed. Cir. 1996) ("[w]e cannot incorporate scientific studies cited for the first time on this appeal into our review"). Second, numerous court decisions have

AOSHPI's misleading characterizations to the contrary, this is not a "garden variety" commercial warranty case. The Klehrs did not sue for breach of contract and are not seeking to recover based on the failure of the silo's represented "benefits." The Klehrs' claim is based on AOSHPI's violations of federal law which occurred when AOSHPI lied to the Klehrs and other farmers about the "oxygen-limiting" characteristics of the silo and that the silo would not damage the feed for the cows. Like the plaintiff in *Kubrick*, the Klehrs never knew and could not know that the silo was slowly poisoning their cattle because they had no access to AOSHPI's secret research studies.<sup>15</sup> The statute of limitations should not begin to run on the Klehrs' RICO claim until the Klehrs learned what AOSHPI long knew—that the representation that Harvestore silos are oxygen-limiting was false.

**III. AOSHPI'S FRAUDULENT CONCEALMENT ESTOPS IT FROM ASSERTING THE LIMITATIONS DEFENSE.**

If the Court rejects the criminal accrual rule and concludes that, as a matter of law, the Klehrs should have known of AOSHPI's racketeering more than four years before they commenced this action, it must then determine whether, for purposes of estopping a defendant from asserting a limitations

found that Harvestore silos do not perform as represented. Third, these articles demonstrate AOSHPI's continuing proclivity to publish the good (and misleading) articles and hide the relevant internal research, making it impossible for farmers to learn the facts which constitute the basis for their claims.

<sup>15</sup>AOSHPI sets up several straw men in its argument on the facts. First, it claims that the Klehrs rely on the representation that the silo would eliminate mold. *Resp. Br. 4, 27, 33*. In fact, the Klehrs' claim is based on the representation that the silo would limit oxygen. Marvin Klehr believed, based on the salesman's representations, that the mold he saw was "insignificant" and did not suggest that the silo was not preserving the great bulk of "good" feed exactly as represented. *Jt. App. 172-73* ¶ 4. Similarly, intermittent tests of the Klehrs' feed did not disclose the damage as the results, at those times, ranged within normal limits for protein loss caused by normal fermentation. See *Record 102*, *Aff. of Charles Bird, Ex. M*, at 2374, 2362, 2329. Finally, the unsupported claim that the Klehrs' milk production records made AOSHPI's fraud apparent is contradicted by the evidence. See *Jt. App. 169*.



defense, acts of fraudulent concealment are to be sanctioned as a means of preventing a victim from learning of his RICO action or whether, instead, such acts shall result in a separate, incremental extension of the limitations period until the victim actually learns of the defendant's wrongdoing. Because AOSHPI concealed its wrongdoing through affirmative acts, rather than through mere failure to disclose the truth, it should be estopped from asserting the limitations defense until the Klehrs learned what had been done to them.

**A. This Court Has Not Addressed the Effect of Fraudulent Concealment on the Limitations Period.**

AOSHPI contends that this issue has already been decided by this Court and that, in the alternative, the mere weight of federal appellate decisions that have refused to apply the "actual knowledge" standard dictate the result in this case. Neither contention is correct.

In *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874), this Court addressed the doctrine of fraudulent concealment, but did so in the context of a defendant's mere failure to disclose the details of a fraudulent conveyance (rather than in the context of affirmative acts of concealment). See *id.* at 343. Thus, "[t]he reference to diligence in *Bailey* . . . is to the plaintiff's discovering that he has a fraud claim," and not to post-fraud acts of concealment. *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1103 (7th Cir. 1992) (Posner, J., concurring). This Court again addressed the issue in *Wood v. Carpenter*, 101 U.S. (11 Otto) 135 (1879), but, as was explained in *Rosenthal v. Walker*, the *Wood* Court "was called on to construe a statute of limitations of the State of Indiana" rather than the federal doctrine of fraudulent concealment. 111 U.S. 185, 190-91 (1884). Accordingly, the next significant development occurred when the Court declared that the doctrine of fraudulent concealment is to be "read into every federal statute of limitations." *Holmberg v. Armbricht*, 327 U.S. 392, 397 (1946).

Although several courts of appeals have held that the *Bailey-Holmberg* discovery doctrine, with its requirement of diligence on the part of the plaintiff, applies in all contexts—regardless of the attempts made by the defendant to prevent the victim from learning

of the defendant's wrongdoing—those courts have routinely reached their decisions with little or no analysis of the issue. The court that has undertaken the most serious analysis of the issue has held that acts of fraudulent concealment toll the limitations period until the victim *actually learns* of the defendant's wrongdoing. See, e.g., *Wolin v. Smith Barney Inc.*, 83 F.3d 847 (7th Cir. 1996). It is the Seventh Circuit's analysis, and the similar analysis provided by the Court of Appeals for the District of Columbia, see, e.g., *Riddell v. Riddell Wash. Corp.*, 866 F.2d 1480, 1491 (D.C. Cir. 1989), that this Court should look to in determining what effect deliberate acts of fraudulent concealment should have on the ability of a defendant to assert the limitations period as a defense.<sup>16</sup>

**B. The Policy Underlying the Doctrine of Fraudulent Concealment Can Only Be Served by Application of the Actual Knowledge Standard.**

Although AOSHPI is content to rest on a string citation and consequently omits any discussion of the arguments set forth by the Klehrs—which arguments rely principally on discussion of the issues contained in opinions by Chief Judge Posner and Judge Becker, see Pet. Br. 46-48—one of AOSHPI's supporting *amici* has addressed the issue. See Honda Br. 29. In sum, *amici* contend that defendants will be sufficiently deterred from engaging in deliberate acts of fraudulent concealment by the risk that such acts, if successful, will extend the period of time during which a victim will not be charged with constructive knowledge of the defendant's wrongdoing. *Amici's* position fails to stand up to careful analysis, and it errs in placing the focus on the conduct of the victim rather than on the deliberate efforts to conceal from the victim the defendant's wrongdoing.

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<sup>16</sup>In *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979), the Second Circuit followed *Sperry v. Baggren*, 523 F.2d 708 (1975), in adopting the "actual knowledge" standard. AOSHPI contends that this case has been implicitly overruled, Resp. Br. 37 n.18, but no case overrules *Robertson*. At least one of the cases cited by AOSHPI suggests that there is now a split in authority in the Second Circuit, but, as the earliest of the cases to address the issue, *Robertson* controls. See *Lo Duca v. United States*, 93 F.3d 1100, 1105 (2d Cir.), cert. denied, 117 S. Ct. 508 (1996).



There are three possible results when a defendant deliberately conceals its wrongdoing: (1) the concealment may be entirely unsuccessful, (2) the concealment may be somewhat successful, in which case the victim learns of the wrongdoing at a later point in time than he would have if the defendant had not attempted the concealment, or (3) the concealment may be entirely successful, in which case the victim never learns of the defendant's wrongdoing. The position of *amici* addresses only the second of these three possibilities—which is, the Klehrs admit, what happened here. *Amici* contend that the tolling of the limitations period until the victims should have learned of the wrongdoing, taking into account the effect of the concealment,<sup>17</sup> is punishment enough. The analysis by *amici* ignores the circumstances in which the concealing wrongdoer either fails in its efforts to conceal or is entirely successful in preventing the victim (or victims) from learning of the wrongdoing.

It is these circumstances—and, most specifically, the circumstance in which the fraudulent concealment is successful—that the doctrine should be designed to address, for it is not the partially successful act of concealment that must be deterred (though it, too, must be deterred), but it is the *successful* act of concealment that the doctrine should seek to prevent. Although the doctrine cannot eliminate all such acts of concealment, if the cost of undertaking such acts—regardless of the degree of ultimate success—is sufficiently great, then defendants will think twice before undertaking to deliberately conceal their wrongdoing. If the only cost is the marginal extension of the limitations period during the time in which the concealment is considered successful, then the cost-benefit analysis (in which no cost is incurred either if the acts are entirely successful or if they are entirely unsuccessful) will often support concealment—for if the acts of concealment succeed entirely, the benefit is immeasurable.

The “actual knowledge” standard better implements the purpose of deterring defendants from engaging in acts of fraudulent

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<sup>17</sup>The *amici*'s argument only works if, in fact, the acts of concealment are taken into account in determining whether the victim should have known of the wrongdoing—something the Eighth Circuit failed to do.

concealment. See *Urland v. Merrell-Dow Pharms.*, 822 F.2d 1268, 1281 (3d Cir. 1987) (Becker, J., dissenting). By focusing on the act of deliberate concealment itself, rather than on its ultimate success, the doctrine punishes the intent of the wrongdoer—which is where the doctrine's focus should be. Thus, Chief Judge Posner's analogy to intentional versus negligent torts is apt: just as the law does not permit a defense of contributory negligence to an intentional tort (regardless of the degree of fault attributable to the victim of the tort), so, too, should the law not permit a defense of lack of sufficient diligence when a wrongdoer engages in deliberate concealment. See *Wolin*, 83 F.3d at 852.

The Court should not adopt a standard, such as the “discovery” standard, that creates an incentive for wrongdoers to attempt to conceal their acts. Cf. *Urland*, 822 F.2d at 1281. Rather, the Court must adopt a standard—predicated on the defendant's intent to conceal, and not merely on its degree of success—that will cause wrongdoers to conclude that the costs of engaging in such conduct do, in fact, outweigh the benefits.

**C. AOSHPI Prevented the Klehrs from Learning that the Harvestore Silo Was the Source of Their Problems.**

Finally, AOSHPI contends that the Klehrs cannot prevail under the doctrine of fraudulent concealment because AOSHPI did not affirmatively conceal the Harvestore's problems—problems the existence of which, paradoxically, AOSHPI continues to deny. AOSHPI attempts to divert the issue from what it has concealed by discussing what it could not have concealed: the fact that the silo did not work as well as promised. See *Resp. Br.* 33-35. This is not a suit in warranty, however, about a product not working as well as expected. This is a case about a pattern of fraud related to the fact that “good Harvestore feed” affirmatively harms cattle. AOSHPI undertook to conceal that fact from the Klehrs and from all other farmers, and it continues to do so by such means as (1) the scratch-and-sniff advertisements which suggest that feed that smells of molasses is good feed, (2) written and oral representations that warm feed is good feed, (3) oral representations by AOSHPI's representatives that the feed coming out of Klehr's silo was good feed and that some mold was to be expected, (4) repairs to the silo

coupled with representations that it was completely resealed, and (5) concealment of negative internal research regarding the failure of the Harvestore silo to exclude oxygen, coupled with publication of misleading "university" research.<sup>18</sup>

### **CONCLUSION**

The Klehrs, and with them farmers throughout this country, have suffered for many years at the hands of AOSHPI. It is only because of the ongoing nature of AOSHPI's criminal fraud that the Klehrs ask this Court to permit their civil RICO claims against AOSHPI to proceed. Whether it be by means of the criminal "last predicate act" rule, a determination that the limitations issues present genuine issues of material fact, or the "actual knowledge" standard applied to affirmative acts of fraudulent concealment, the Klehrs ask that this Court reverse the judgment of the Court of Appeals for the Eighth Circuit and remand this action so that the Klehrs may, at long last, have their day in court.

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<sup>18</sup>This is precisely the sort of conduct described by Judge Posner's example, in *Martin*, of a plaintiff who, having invested money with the defendant and lost it, is told some "elaborately fraudulent tale," as a result of which the plaintiff loses time in learning of the defendant's wrongdoing. See 966 F.2d at 1102; see also *Wood*, 101 U.S. (11 Otto) at 143 (a "trick or contrivance" constitutes fraudulent concealment).

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**In the Supreme Court of the United States**  
October Term, 1996

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MARVIN KLEHR AND MARY KLEHR,  
*Petitioners,*

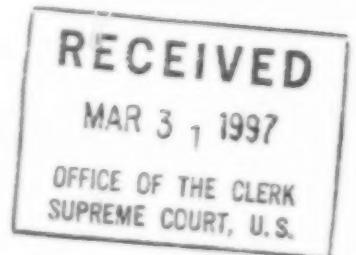
v.

A.O. SMITH CORPORATION AND  
A.O. SMITH HARVESTORE PRODUCTS, INC.,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals for the Eighth Circuit

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**MEMORANDUM OF PETITIONERS REGARDING  
THE MOTION OF AMICI CURIAE  
FOR DIVIDED ARGUMENT AND FOR LEAVE TO ARGUE ORALLY**

Petitioners submit this response to the motion of amici curiae, the American Council of Life Insurance ("ACLI") and American Honda Motor Company, Inc. ("Honda"), to correct misstatements contained in ACLI/Honda's memorandum regarding the issues pending before the Court.

In their motion, ACLI and Honda identify four alternative RICO accrual rules and suggest that Petitioners rely upon one of the rules identified. In fact, Petitioners rely on a fifth rule of accrual identical to the rule which is applied in criminal RICO cases. That rule provides that the




Petitioner takes no position with respect to the moving party's motion but seeks only to correct the misstatement described above.

Charles C. Bird (m)

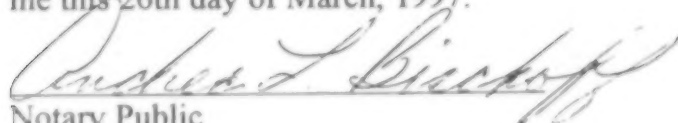
ATTORNEYS FOR PETITIONERS  
MARVIN AND MARY KLEHR

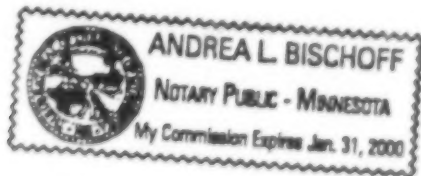
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Subscribed and sworn to before  
me this 26th day of March, 1997.

  
Notary Public



FEB 21 1997

In The  
**Supreme Court of the United States** CLERK  
October Term, 1996

MARVIN KLEHR and MARY KLEHR,

*Petitioners,*

vs.

A.O. SMITH CORPORATION and A.O. SMITH  
HARVESTORE PRODUCTS, INC.,

*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eighth Circuit

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*February 20, 1997*



**QUESTIONS PRESENTED**

1. When does Petitioners' civil RICO claim accrue for purposes of the statute of limitations where Respondents continue to commit predicate acts which cause Petitioners additional, continuous, or accumulating injuries to their business or property within four years of bringing suit?
2. Did Respondents engage in fraudulent conduct that was self-concealing and/or subsequent acts of active concealment so as to suspend the running of the statute of limitations for Petitioners' civil RICO action under the doctrines of equitable tolling and/or fraudulent concealment?

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**BRIEF OF AMICUS CURIAE NATIONAL  
ASSOCIATION OF SECURITIES AND  
COMMERCIAL LAW ATTORNEYS (NASCAT) IN  
SUPPORT OF PETITIONERS**

**INTEREST OF AMICUS CURIAE**

NASCAT is an association of law firms and attorneys who litigate cases involving antitrust, commercial, consumer, employee benefit, environmental, pension and securities fraud claims in federal and state courts. NASCAT's members frequently represent victims of corporate abuse, schemes to defraud and so-called "white collar" criminal activity. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent wrongful, fraudulent, deceptive and manipulative business practices.

NASCAT and its members have a profound interest in the scope and bases of civil liability under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968. NASCAT's members have represented the victims of fraudulent schemes and so-called "white collar" crime in many significant civil RICO actions filed, litigated, tried and/or settled in recent years, including *In re American Continental Corp./ Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992); *In re Crazy Eddie Sec. Litig.*, 812 F. Supp. 338 (E.D.N.Y. 1993); *In re ZZZZ Best Sec. Litig.*, 864 F. Supp. 960 (C.D. Cal. 1994); and *In re Prudential Sec., Inc. Sec. Litig.*, 930 F. Supp. 68 (S.D.N.Y. 1996). Because of their years of experience representing the victims of fraudulent schemes in civil RICO actions, NASCAT's members can offer a helpful perspective to this Court in evaluating the arguments made by Petitioners and Respondents in this case, which concerns the appropriate accrual rule for the four-year statute of limitations governing civil RICO



actions, as well as the application of the fraudulent concealment and equitable tolling doctrines in such cases.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Since this Court's decision in *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987) ("*Malley-Duff*"), which held that a four-year limitations period borrowed from federal antitrust law governs civil actions brought under § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the courts have adopted conflicting rules governing *when* civil RICO actions *accrue*. This Court should adopt a uniform rule of accrual and NASCAT submits that the "last predicate act" rule elucidated in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-31 (3d Cir. 1988) should be followed.

In *Holmberg v. Ambrecht*, 327 U.S. 392, 397 (1946), Justice Frankfurter stated that the equitable doctrine of fraudulent concealment "is read into every federal statute of limitations." While courts have found this doctrine applicable in antitrust cases, *see Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978), securities fraud cases, *see Suslick v. Rothschild Sec. Corp.*, 741 F.2d 1000, 1002 (7th Cir. 1984), as well as in civil RICO cases, *see McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992), the decisions of the courts below (as well as decisions rendered in other circuits) demonstrate that the parameters of applicable tolling doctrine(s) in civil RICO cases require elucidation by this Court.<sup>1</sup>

<sup>1</sup> See *Klehr v. A.O. Smith Corp.*, 875 F. Supp. 1342, 1352 n.6 (D. Minn. 1995) (entering summary judgment for defendant because they "did not conceal the facts constituting the cause of action"), *aff'd*, 87 F.3d 231, 239 n.11 (8th Cir. 1996) ("We reject the Klehrs' argument that federal equitable tolling principles save their claim from being barred by the statute of limitations."), *cert. granted*, 117 S. Ct. 725 (1997).

## I. ARGUMENT

### A. Given The Conflicting Rules Adopted By The Circuit Courts Following This Court's Decision In *Malley-Duff*, It Is Appropriate For This Court To Elucidate A Uniform Rule Of Accrual For Civil RICO Actions

When Congress enacted RICO in 1970, it failed to institute a specific limitations period for civil actions, notwithstanding the well-recognized need for a statute of limitations. *See Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting) ("Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations."). In civil RICO cases, the applicable limitations period remained unsettled until *Malley-Duff*, which held that a uniform four-year period borrowed from the Clayton Act would be the applicable period for civil RICO claims. 483 U.S. at 156.<sup>2</sup> This Court, however, expressly refused to reach the question of *when* civil RICO claims accrue. *Id.* at 156-57.<sup>3</sup>

<sup>2</sup> See generally Donna A. Boswell, Comment, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. Pa. L. Rev. 1447 (1987) (discussing *Malley-Duff* in the context of federal jurisprudence on statutes of limitations); *see also Special Project - Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011, 1084-94 (1980) (discussing qualifications to time bars, including accrual and tolling doctrines).

<sup>3</sup> "Accrual" refers to the point at which a cause of action may be maintained. Black's Law Dictionary 20-21 (6th ed. 1990). The start of a limitations period and the accrual of a cause of action are terms that are often used synonymously by many courts. *See Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 338 (1971) ("Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business."); *United States v. Kubrick*, 444 U.S. 111, 122

In the wake of *Malley-Duff*, the circuits have split on the question of *when* the four-year limitations period begins to run in a civil RICO action and, several differing theories of accrual have been elucidated. See *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir.) (collecting cases), *cert. granted*, 116 S. Ct. 2521 (1996), *cert. dismissed*, No. 95-1722 (Jan. 14, 1997); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 152 (8th Cir. 1991) (describing "smorgasbord of civil RICO accrual rules" from which to select most appropriate rule).<sup>4</sup> While there is some common ground because each circuit has "incorporated the principle of discovery into the accrual rule governing civil RICO actions in the particular circuit," *id.* at 153, the circuits disagree about "what the plaintiff must actually or constructively know before the limitations period will start to run." *Id.* The existing rules provide widely varying periods of time

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(1979) (under Federal Tort Claims Act, cause of action has accrued if "a plaintiff [is] in possession of the critical facts *that he has been hurt and [knows] who has inflicted the injury*") (emphasis added); *id.* at 126 (Stevens, Brennan & Marshall, JJ., dissenting); but see *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1412 (9th Cir. 1987) (in cases where *fraud* is alleged, claim accrues when plaintiff suffers injury, but statute of limitations does not run until claim is *discovered*). Federal law governs when civil RICO claims accrue. See *Cope v. Anderson*, 331 U.S. 461, 464 (1947).

<sup>4</sup> For commentary on the various accrual rules and their ramifications in civil RICO litigation, see G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability*, 33 Am. Crim. L. Rev. 1345 (1996); Douglas E. Abrams, *The Law of Civil RICO* § 2.4 (Little Brown & Co. 1991 & Cum. Supp. 1996) ("Civil RICO"); Paul B. O'Neill, "Mother of Mercy, Is This the Beginning of RICO?: The Proper Point of Accrual of a Private Civil RICO Action," 65 N.Y.U. L. Rev. 172 (1990) ("Proper Point of Accrual"); Mary S. Humes, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399 (1990) ("Uniform Rule of Accrual"); Edwin Scott Hackenberg, *All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of Agency Holding Corp. v. Malley-Duff*, 48 La. L. Rev. 1411 (1988) ("Accrual of Civil RICO Claims").

within which an injured person may investigate and bring a civil RICO action. NASCAT submits that this Court should adopt a uniform rule governing such actions. Although the majority of the courts have adopted "injury discovery" and "injury and pattern discovery" rules, see Part III.B, *infra*, given their inherent limitations this Court should follow the "last predicate act" accrual rule announced by the Third Circuit in *Keystone*, 863 F.2d at 1130-33, because it fulfills the public policies underlying RICO and correctly characterizes a civil RICO action as a remedy designed to compensate victims and punish perpetrators of a *continuing* violation of federal and/or state law. See Part III.C, *infra*.

**B. While The Majority Of The Circuit Courts Have Adopted The So-Called "Injury Discovery" And "Injury And Pattern Discovery" Rules, Their Inherent Limitations Weigh Against Their Adoption By This Court**

The First, Second, Fourth, Fifth, Seventh, Ninth and D.C. Circuits employ an *injury*-based accrual rule, holding that a civil RICO action accrues at the time plaintiff *discovered* or should have discovered his, her, or its *injury*. See *Grimmett*, 75 F.3d at 511 ("The limitations period [for civil RICO actions] begins to run when a plaintiff knows or should know of the injury which is the basis for the action." ) (citation omitted).<sup>5</sup> Under this rule, however, a

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<sup>5</sup> Accord *Rodriguez v. Banco Cent.*, 917 F.2d 664, 665 (1st Cir. 1990) (Breyer, Ch.J.) ("[T]he statute begins to run when a plaintiff discovered, or should have discovered, his injury."); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988) (same); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987) (RICO's limitations period "begins to run when a plaintiff knows or should know of the injury that underlies his cause of action."); *La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool*, 972 F.2d at 1464-65; *Volk*, 816 F.2d at 1415; *Riddell v. Riddell Washington*



RICO plaintiff "need not discover that the injury is part of a 'pattern of racketeering' for the period to begin to run." *Grimmett*, 75 F.3d at 510 (quoting *McCool*, 972 F.2d at 1465).

The potential injustice of the "injury discovery" rule may be illustrated by a simple hypothetical: Suppose plaintiff suffers an injury to his business or property in 1990 when defendant commits an illegal act which constitutes a predicate act of "racketeering activity."<sup>6</sup> Assume that plaintiff *discovers* that injury to his business or property in 1994. Although injured, where the "injury discovery" rule is followed, plaintiff cannot bring a civil RICO action at this point because there is as yet no "pattern of racketeering activity" that can be properly alleged; even under the most liberal interpretation of the pattern requirement, *two* predicate acts are necessary.<sup>7</sup> Assume

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*Corp.*, 866 F.2d 1480, 1489-90 (D.C. Cir. 1989); *see also* *Abrams*, *Civil RICO* § 2.4, at 61 ("A civil RICO claim accrues when the plaintiff discovered or had reason to discover the proprietary injury that is the basis of the claim.") (footnotes and citations omitted).

<sup>6</sup> See 18 U.S.C. § 1961(1) (defining "racketeering activity" to include such offenses as bribery, arson, extortion, and threats to commit any of the above, as well as other activities already criminalized elsewhere in the U.S. Code, such as mail fraud, wire fraud, interstate transportation of stolen property, embezzlement and bankruptcy fraud).

<sup>7</sup> See 18 U.S.C. § 1961(5) (defining "pattern of racketeering activity"); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) ("[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity."); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) ("It is the factor of *continuity plus relationship* which combines to produce a pattern. . . . '[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing

further that plaintiff sustains *another injury* to his business or property caused by another predicate act committed by defendant; plaintiff discovers the *second* injury in 2000 and then files a civil RICO action. Under the "injury discovery" accrual rule, plaintiff would be unable to recover in that action for the 1994 injury, even though he sustained two injuries caused by predicate acts of racketeering occurring within ten years of each other, the baseline requirement for a civil RICO claim. Courts applying this accrual rule would hold that the 1994 discovery triggered the four-year limitations period, so plaintiff's civil RICO claim became time-barred in 1998, before he could even allege a pattern of racketeering activity that included the second predicate act and resulting injury. *See State Farm Mut. Auto Ins. Co. v. Ammann*, 828 F.2d 4, 4-5 (9th Cir. 1987). As a result, the "injury discovery" rule has been subject to well-justified criticism,<sup>8</sup> and there is no compelling reason why such a restrictive accrual rule should be adopted by this Court.

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characteristics and are not isolated events.' ") (emphasis in original, citation omitted).

<sup>8</sup> See O'Neill, *Proper Point of Accrual*, 65 N.Y.U. L. Rev. at 205-06 ("[U]nder the discovery rule it is possible that a plaintiff could discover an injury caused by a defendant's racketeering act and have the statute of limitations run on that injury prior to the time of the commission of the second predicate act necessary to perfect plaintiff's right to relief under the statute. The RICO plaintiff might have part of his cause of action barred before he ever has the opportunity to sue.") (footnote omitted); Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1410 (noting that the "injury discovery" accrual rule "may clash with the pattern [of racketeering activity] requirement" because "[i]f the claim accrues after the first injury but before the plaintiff can state a pattern, plaintiff may be time barred before he can state a claim. . . . Because of this defect, the discovery rule cannot be reconciled completely with the pattern requirement of RICO and is therefore not the best accrual rule for RICO actions.") (footnote omitted).



The rule followed in the Third, Eighth, Tenth and Eleventh Circuits applies the general discovery rule to both the "pattern" and "injury" elements of the civil RICO cause of action. As the court below stated: "This circuit employs a discovery accrual standard to civil RICO claims; under this standard, such an action begins to accrue 'as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.'" 87 F.3d at 238 (emphasis added, citation omitted). In the words of the Eleventh Circuit:

[W]ith respect to each independent injury to the plaintiff, a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern. . . . Because a civil RICO plaintiff must prove that his injury is part of a pattern of racketeering activity, an injured party must know, or have reason to know, that his injury is part of a pattern before he can be expected to file a civil RICO cause of action.

*Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990) (emphasis added).

Muddying the rough distinction between these accrual rules (i.e., injury-based accrual versus injury-and-pattern-based accrual) is the fact that courts in both groups utilize a "separate accrual" rule.<sup>9</sup> Application of

<sup>9</sup> In his concurrence in *State Farm*, 828 F.2d at 5, then-Judge Kennedy first applied the "separate accrual" rule in the RICO context:

The rule is that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and the other acts were committed outside the limitations period. A corollary rule is that damages may not be recovered for injuries

this doctrine was illustrated in *Bankers Trust*, where the plaintiff bank alleged that the defendant officers of a bankrupt corporation: (1) wrongfully concealed assets during a 1974-76 bankruptcy proceeding; (2) conducted harassing lawsuits in 1978-79 to prevent plaintiff from vacating the fraudulently obtained bankruptcy plan; and (3) fraudulently conveyed property in 1981. 859 F.2d at 1098-99. The bank incurred various legal fees and expenses over time, besides the loss of the underlying debt.<sup>10</sup> Observing that in enacting RICO, Congress had in mind the possibility of "multiple and independent [injuries] that occur over a broad span of time," the Second Circuit held that a rule permitting a new cause of action to accrue with each such injury was "[t]he logical end result." *Id.* at 1103. The court adopted the separate accrual rule and found that the final two injuries were

sustained as a result of acts committed outside the limitations period.

*Id.* (citations omitted). To date, some form of the "separate accrual" rule has been adopted by the First, Second, Seventh, Eighth, Tenth and Eleventh Circuits. See, e.g., *Rodriguez*, 917 F.2d at 666; *Bankers Trust*, 859 F.2d at 1102; *McCool*, 972 F.2d at 1464-66; *Granite Falls*, 924 F.2d at 154; *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990); *Bivens Gardens*, 906 F.2d at 1554-55; see also *Grimmett*, 75 F.3d at 510-11 (collecting cases); Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1411-13.

<sup>10</sup> In *Bankers Trust*, the court held that the bank's claim for some of the damages caused by defendants' fraud was too speculative and, therefore, unrecoverable. Because the bankruptcy proceeding was not yet concluded, it was not clear what proportion of its loss the bank would ultimately recover. Its injury, therefore, could not yet be determined. As a result, the nature and amount of its damages was unprovable and, even though the fraud had occurred in 1974, the bank's cause of action for these damages had yet to accrue in 1988. 859 F.2d at 1106.

"independent" of the first and, therefore, not time-barred. *Id.* at 1102-05.<sup>11</sup>

Another version of the "separate accrual" rule was recognized in *Bivens Gardens*, where defendants were accused of committing three sets of predicate acts: (1) a wrongful takeover of a limited partnership in 1975; (2) mismanagement and diversion of the partnership's assets from 1975 to 1981; and (3) sale of a hotel, the partnership's primary asset, at below fair market value in 1981. 906 F.2d at 1549-51. The Eleventh Circuit held that the mismanagement and subsequent sale of the hotel were "new and independent" acts because they "[were] not included among the injuries that naturally flow from the wrongful takeover [in 1975]." 906 F.2d at 1551. Therefore, the "separate accrual" rule includes both further predicate acts committed by defendant and further injuries sustained by plaintiff:

*if further predicate acts occur that are part of the same pattern of racketeering, regardless of whether they injure the plaintiff, or if the plaintiff suffers further injury from a predicate act that is part of the same pattern of racketeering, even if that predicate act occurred outside the limitations period, the statute of limitations begins to run*

<sup>11</sup> A necessary corollary of the separate accrual rule is that plaintiff may only recover for injuries discovered (or discoverable) within four years of the time when suit is brought. See *Bankers Trust*, 859 F.2d at 1104-05. "As long as separate and independent injuries continue to flow from the underlying RICO violations – regardless of when those violations occurred – plaintiff may wait indefinitely to sue, but may then win compensation only for injuries discovered or discoverable within the four-year 'window' before suit was filed, together, of course, with any provable future damages." *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995), cert. denied, 116 S. Ct. 1418 (1996) (citing *Bankers Trust*, 859 F.2d at 1103). See also *Cruden v. Bank of New York*, 957 F.2d 961, 977 (2d Cir. 1992); *In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litig.*, 850 F. Supp. 1105, 1116-19 (S.D.N.Y. 1993).

*from the date that the plaintiff knew or should have known of the last such act or the last such injury.*

*Davis v. Grusemeyer*, 996 F.2d 617, 623 (3d Cir. 1993) (emphasis added) (citing *Keystone*, 863 F.2d at 1126).<sup>12</sup> In application, however, courts have required RICO plaintiffs to allege and prove "new," "independent," or "distinct" injuries, rather than recognize that further predicate acts committed by defendant revive a RICO cause of action, if they are part of the same pattern. The court below ignored Petitioners' allegations of a continuing pattern of racketeering activity committed by defendants, holding that "continuing damage" sustained by Petitioners "into the limitations period through the continued use, operation, and repair of the Harvestore silo" did not revive their civil RICO claims, and stating that "these separate, discrete 'injuries' that the Klehrs identify are more appropriately categorized as one single, continuous injury that was sustained sometime in the 1970s and for which the limitations period commenced long before August 27, 1989." 87 F.3d at 239 (citing *Glessner v. Kenny*,

<sup>12</sup> In *McCool*, the Seventh Circuit misstated this doctrine, emphasizing that "[u]nder a separate accrual rule, a new cause of action accrues only when there is a new instance of wrongful conduct and a new injury." 972 F.2d at 1465 n.10 (emphasis in original). In *Malley-Duff*, 483 U.S. at 150, this Court stated that the Clayton Act provides the closest analogy to RICO and, while actions brought under the Clayton or Sherman Acts do not require a "pattern," antitrust law recognizes the ongoing nature of antitrust violations. While an antitrust violation normally accrues when defendant commits an act that injures plaintiff's business, see *Zenith Radio*, 401 U.S. at 338, courts have carved out an exception to this accrual rule in the case of a continuing violation. See *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 495 (1968). Each violative act triggers a new limitations period and plaintiff may recover damages for those acts that occurred in the four years immediately preceding the filing of the claim. *Zenith Radio*, 401 U.S. at 338; *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1300 (9th Cir. 1986).



952 F.2d 702, 708 (3d Cir. 1991)). The court below misunderstood or deliberately misapplied the separate accrual doctrine.<sup>13</sup>

The vagaries of the "injury and pattern discovery" rule and/or the "separate accrual" rule invariably mean that meritorious plaintiffs' RICO claims are unjustifiably time-barred. The factual variations evident in civil RICO litigation demonstrate the need for this Court to adopt a rule of accrual that takes into account the multiple (and analytically complex) injuries often present in such cases. It is the unusual case where plaintiff sustains only a "single" (albeit economically significant) injury from defendants' course of illegal conduct, such as *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992), a securities fraud/civil RICO

<sup>13</sup> The Eighth Circuit's reliance upon the Third Circuit's decision in *Glessner* was misplaced. In that case, plaintiffs brought their RICO actions in 1988 after defendants had ceased production of an allegedly defective furnace in 1983, thus ending the pattern of racketeering activity. Appealing dismissal of their RICO claims, plaintiffs argued that although they first suffered injury, in the form of excessive repairs, prior to the expiration of the four-year limitations period, they suffered a "new and independent injury" in 1984 when they had to replace the furnace; this new injury, they claimed, reset the statute of limitations. 952 F.2d at 706-07. The Third Circuit found that plaintiffs' replacement of the furnace did not constitute a new and distinct injury but, rather, a continuation of their initial injury and concluded that "the mere continuation of damages into a later period will not serve to extend the statute of limitations." *Id.* at 708. However, *Glessner* is distinguishable because plaintiffs there *did not allege further predicate acts*; in this case, Petitioners' complaint details an undisputed pattern of racketeering activity lasting until the Spring of 1991, nearly 17 years after they originally purchased the Harvestore. Whether or not those further predicate acts injured Petitioners (and their complaint and expert witness damage analysis say that they did), does not matter under the correct application of the "separate accrual" rule.

class action brought on behalf of 23,000 defrauded investors who lost hundreds of millions of dollars when worthless subordinated debentures went into default; plaintiffs were injured only once by the alleged pattern of racketeering activity and their claims accrued on the same date.<sup>14</sup> In other cases, such as *In re Prudential Sec. Ltd. Partnerships Litig.*, 930 F. Supp. 68 (S.D.N.Y. 1996) a securities fraud/civil RICO class action brought on behalf of more than 100,000 investors who lost hundreds of millions of dollars when they were fraudulently induced to invest in limited partnerships worth substantially less than represented by the promoters, the existence of multiple injuries resulting from virtually innumerable predicate acts complicates the accrual question.<sup>15</sup> The four-year

<sup>14</sup> As the Third Circuit stated in *Keystone*, 863 F.2d at 1133, "[t]he [injury discovery accrual] rule is an effective rule where the facts indicate that there was one victim and each element and all predicate acts of a RICO violation were present at the same time."

<sup>15</sup> In *Prudential Sec.*, 930 F. Supp. 68, plaintiffs and the members of the class invested in six different (but related) limited partnerships formed between 1985 and 1991. Applying the discovery rule followed in the Second Circuit, Senior Judge Pollack analyzed the accrual of the investors' civil RICO claims:

The statute of limitations did not begin to run on the date that investors received prospectuses in the limited partnerships, but at the date investors were in possession of sufficient information to suggest the probability of fraud. This did not occur until, at earliest, October, 1990, when capital losses were first suffered as a result of the sale of Polaris aircraft. Indeed, the record currently before the Court contains no indication that investors even learned of these capital losses until January of 1992, when the format of Prudential's monthly statements was altered so that the value of investments was no longer recorded at par. Thus, it cannot be determined . . . as a matter of law that investors in any of the Polaris limited partnerships were on notice of their injuries at a point



period begins to run on each injury when it is discovered, but application of the discovery rule in the multiple injury case results in a divisible cause of action, making it likely that plaintiff's claim may be partially barred by the statute of limitations when he has suffered multiple injuries arising from multiple predicate acts extending over a period of time.

**C. This Court Should Adopt The "Last Predicate Act" Accrual Rule Followed By The Third Circuit In *Keystone***

The Third Circuit was the first circuit to depart from the injury-based accrual civil RICO rules and apply discovery principles to the *pattern of racketeering activity* element of a RICO cause of action. The "last predicate act" rule states:

The limitations period for a civil RICO claim runs from the date the plaintiff knew or should have known that the elements of the civil RICO cause of action existed, *unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur . . . in that case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same "pattern."*

\* \* \*

If the complaint was filed within four years of the last injury or the last predicate act, the plaintiff may recover for injuries caused by the other predicate acts which occurred outside an earlier

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four years prior to the filing of this suit on June 8, 1994.

930 F. Supp. at 76-77.

limitations period but which are part of the same "pattern."

863 F.2d at 1126, 1130-31 (emphasis added). In *Keystone*, an insurance company that was one of several companies defrauded by defendant's pattern of defrauding insurers alleged an ongoing pattern of racketeering activity which continued at least until September 1983, when an act of mail fraud was committed for which defendants were criminally convicted and sentenced in 1986. Plaintiff filed its RICO claim one month later, in July 1986. *Id.* at 1127. Reversing the district court's decision, which had ruled the claim untimely under a "last injury discovery" rule, the Third Circuit held that the RICO claim was timely filed under the "last predicate act" accrual rule because the insurer alleged that it discovered that defendant had committed a predicate act against one of the other insurance company victims within the past four years. After carefully examining RICO's express purpose, statutory language and legislative history, as well as the elements and injury requirement of a civil RICO action, *id.* at 1127-33,<sup>16</sup> *Keystone* correctly recognizes that "the essential problem" with the so-called "injury-based" civil RICO accrual rules

lies in the fact that RICO is a crime of association, which is violated, *inter alia*, by "any person . . . associated with any enterprise . . . the activities of which affect . . . commerce, conduct[ing] . . . [the] enterprise's affairs through a

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<sup>16</sup> In *Keystone*, the plaintiff insurer was not injured by *every* predicate act that constituted the alleged pattern of racketeering activity; defendant had engaged in a pattern of defrauding numerous insurance companies. The Third Circuit held that plaintiff's RICO claim was not time-barred because the last predicate act, which did not injure plaintiff, was part of the *pattern* that injured plaintiff and fell within the limitations period. 863 F.2d at 1130. Likewise, for purposes of RICO standing this Court has recognized that a plaintiff need *not* be injured by *every* predicate act. *Sedima*, 473 U.S. at 495.

pattern of racketeering." 18 U.S.C. § 1962(c). Therefore the discovery rule must apply to the pattern element as well as the injury element. If the plaintiff does not discover until, for example, five years after the first injury to that plaintiff, that the injury or injuries were part of a pattern of racketeering, then that plaintiff could not bring a successful civil RICO action using the last injury discovery rule. Thus, the last injury discovery rule would not effectively fulfill the purpose of the statute where predicate acts which are part of the same "pattern" and which do not injure the plaintiff occur after the last injury to the plaintiff.

*Id.* at 1129-30.<sup>17</sup>

<sup>17</sup> See also *Greenberg v. Tomlin*, 816 F. Supp. 1039, 1051 (E.D. Pa. 1993) (plaintiff's RICO limitations period "must be measured from the time it knew or should have known of the pattern of racketeering activity" because if the plaintiff's "knowledge of injury arises solely from a single predicate act," it will have "discovered the injury but not the pattern"); Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1415-16 (explicating *Keystone* rule); O'Neill, *Proper Point of Accrual*, 65 N.Y.U. L. Rev. at 218-20 (same). Although the *Keystone* accrual rule appears more liberal than the injury-based or injury- and pattern-based accrual rules, courts have not hesitated to dismiss civil RICO claims which were not timely brought. See, e.g., *Arab African Int'l Bank v. Epstein*, 10 F.3d 168, 174-75 (3d Cir. 1993) (rejecting proposed RICO amendment to complaint as untimely); *Fineberg v. Credit Int'l Bancshares*, 857 F. Supp. 338, 349 (D. Del. 1994) (predicate acts that allegedly prolonged limitations period were not "related to" and in "continuity with" pattern of racketeering activity alleged by plaintiff); *Owens v. Wade*, 789 F. Supp. 168, 172-75 (E.D. Pa. 1992) (same); *Korman v. Trusthouse Forte PLC*, 786 F. Supp. 458, 462-66 (E.D. Pa. 1992) (same); *Panna v. Firsttrust Sav. Bank*, 749 F. Supp. 1372, 1377-78 (D.N.J. 1990) (applying *Keystone* and finding civil RICO claims time-barred), *vacated on reconsideration*, 760 F. Supp. 432, 437-38 (D.N.J. 1991) (applying *Keystone* and finding RICO claims timely).

Recognizing that "[t]he primary source of RICO's unique character is its pattern requirement," *Granite Falls*, 924 F.2d at 153, three circuits have followed *Keystone* in applying discovery principles to both the injury and pattern elements for accrual purposes. See *id.* at 154 (Eighth Circuit); *Bath*, 913 F.2d at 820 (Tenth Circuit); *Bivens Gardens*, 906 F.2d at 1553-54 (Eleventh Circuit). None of these courts, however, adopted the "last predicate act" discovery element of the *Keystone* accrual rule. In *Bivens Gardens*, the Eleventh Circuit sought to factually distinguish *Keystone* and incorporated a limiting "separate accrual" exception. 906 F.2d at 1554-55. In *Granite Falls*, the Eighth Circuit embraced the *Bivens Gardens* "separate accrual" rule, stating that it "better reflects the underlying policy of a statute of limitations requiring diligence on the part of the plaintiff than does the seemingly more open-ended rule fashioned by the Third Circuit in *Keystone*." 924 F.2d at 154.<sup>18</sup> In *Bath*, the Tenth Circuit adopted the *Bivens Gardens* rule without commenting on *Keystone*. 913 F.2d at 820.

The unique nature of a civil RICO cause of action, which requires allegation and proof of injuries caused by a pattern of racketeering activity, weighs strongly in favor of adoption of the "last predicate act" accrual rule for several reasons.<sup>19</sup> First, any accrual rule adopted must

<sup>18</sup> In this case, the Eighth Circuit refused to revisit this issue and flatly rejected Petitioners' "request that we adopt the 'last predicate act' accrual rule outlined by the Third Circuit" in *Keystone*, "or a variation thereof." 87 F.3d at 239.

<sup>19</sup> Bolstering the determination that *Keystone* presents the appropriate civil RICO accrual rule is Congress's dictate that RICO "shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) (codified at 18 U.S.C. § 1961 note). *Sedima* made clear that this dictate, coupled with "Congress' self-consciously expansive language and overall approach" mandate that "RICO is to be read broadly." 473 U.S. at 497-98. See *Keystone*, 863 F.2d at 1131-32; O'Neill, *Proper Point of Accrual*,



be reconciled with § 1961(5) of RICO, which provides that a "pattern of racketeering activity" requires "at least two acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (emphasis added). See *H.J., Inc.*, 492 U.S. at 237 (observing that § 1961(5) "places an outer limit on the concept of a pattern of racketeering activity that is broad indeed"). *Keystone* acknowledged that "the accrual rule we fashion must take the specific language of the statute into account," 863 F.2d at 1132, because

there is inherent in the statute a ten year limit on the point at which the last predicate act for purposes of accrual may occur. Congress in enacting the ten year limit must have envisioned causes of action which would involve patterns of racketeering extending over that period of time. It would be inconsistent with this breadth of definition for us to state that we will look to the past ten years to see if a civil RICO claim exists but if we find ten years of racketeering activity, all related and all perpetrated by the same defendants, we will provide a remedy only to those who were victimized within the past four years. To do so would encroach upon and limit a legislatively-enacted scheme to provide recovery for racketeering injuries. See 18 U.S.C. § 1961(5), 1964(c).

*Id.* at 1132-33 (footnote omitted).<sup>20</sup>

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65 N.Y.U. L. Rev. at 220-25 (explicating public policies underlying RICO that favor *Keystone* rule).

<sup>20</sup> Given "the federal interest in providing relief to those who are injured by a course of continual and related conduct, it would be incongruous to bar, on statute of limitations grounds, recovery for predicate acts taking place outside the limitations period and permitting recovery only for those within the limitations period." *County of Cook v. Berger*, 648 F. Supp. 433, 435 (N.D. Ill. 1986). In that case, the district court determined

Of the several characterizations of the civil RICO claim that have been made, the most applicable is that of RICO as a *continuing* violation. In *Malley-Duff*, 483 U.S. at 150, this Court held that the Clayton Act "provides a far closer analogy" to RICO than any available state statute and, while actions brought under the Sherman or Clayton Acts do *not* require allegation and proof of a "pattern," federal antitrust law has recognized the *continuing* nature of antitrust violations.<sup>21</sup> *Keystone* relied on *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir. 1978), a criminal RICO case, where Judge Lasker explained:

[RICO] provides an example of a continuing offense for purposes of computing the time at which the statute of limitations begins to run. The "nature of

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that since "it is the continuing nature of the violation that is the very essence of a RICO claim," *id.* at 434 n.1, the statute of limitations would run from the "last overt act" committed as part of the pattern, and Judge Kocoras rejected defendant's contention that the statute of limitations should run from the time when the County of Cook knew, or should have known, of its injury. See O'Neill, *Proper Point of Accrual*, 65 N.Y.U. L. Rev. at 217-18 (discussing "last-act" rule of accrual).

<sup>21</sup> See *Hanover Shoe*, 392 U.S. at 495 (affirming damages award based upon continuing violation of antitrust laws); *Hennegan*, 787 F.2d at 1300 (continuing violation occurs when plaintiff's interests are repeatedly invaded); *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1051 (5th Cir. 1982) (explicating "continuing violation" and "continuing conspiracy" rules under Clayton Act); see also Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1408 (arguing that RICO's analogy to antitrust law "requires a hybrid rule of accrual which combines continuing violation principles with the discovery rule"). Under the "last predicate act" rule adopted in *Keystone*, plaintiff may recover damages for the entire pattern of RICO violations, even though some acts may have occurred outside the limitations period - more than four years later; the antitrust rule limits damages to those acts that occurred within the four years before the filing of the claim. *Id.* at 1413-14.



the crime . . . is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie v. United States*, 397 U.S. 112, 115 (1970). The language of [RICO], which makes a pattern of conduct the essence of the crime, "clearly contemplates a prolonged course of conduct." *Id.* at 120. Like the statute of limitations for conspiracies, which runs from the date of the last overt act, *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957), the statute of limitations for violations of [RICO] runs from the date of the last alleged act of racketeering activity.

432 F. Supp. at 59 (emphasis added; parallel citations omitted). In criminal RICO cases brought under § 1962(c), the statute of limitations begins to run from the date of the last predicate act of racketeering activity, see *United States v. Torres Lopez*, 851 F.2d 520, 524-25 (1st Cir. 1988); on the other hand, in § 1962(a) prosecutions, the statute begins to run on the last date of use or investment of income derived from a pattern of racketeering activity, rather than on the date of the last predicate act of racketeering activity, see *United States v. Vogt*, 910 F.2d 1184, 1196 (4th Cir. 1990). *Keystone* stated that "[a]n interesting analogy to the ['last predicate act'] rule which we announce is the accrual rule in RICO criminal conspiracy cases," noting that in "§ 1962(d) conspiracy cases, no overt act need be proven." 863 F.2d at 1132. Therefore, "the statute of limitations in conspiracy cases where no overt act need be proven, such as a RICO conspiracy, does not run from commission of the last overt act; the conspiracy may be deemed to continue as long as its purposes have neither been abandoned nor fully accomplished." *Id.*<sup>22</sup>

<sup>22</sup> See also *United States v. Masters*, 924 F.2d 1362, 1368 (7th Cir. 1991) (statute of limitations for RICO conspiracy does not begin to run until accomplishment of or abandonment of conspiracy's objectives). Given the incidence of parallel civil RICO actions and criminal RICO cases (such as *ACC/Lincoln Savings* and the Government's RICO prosecution of notorious

With the exception of *Keystone*, the circuit courts have failed to reconcile their respective accrual rules with the RICO's statutory language. In *Rodriguez*, the First Circuit asserted that the *Keystone* accrual rule, when applied in conjunction with § 1961(5), could potentially allow an injured RICO plaintiff 14 years to bring suit. 917 F.2d at 664. Then-Chief Judge Breyer found this possibility "difficult to reconcile" with this Court's "determination that 'there is a need for a uniform statute of limitations for civil RICO' lest 'the memories of witnesses . . . fade[] or evidence [be] . . . lost.'" *Id.* (quoting *Malley-Duff*, 483 U.S. at 156). NASCAT respectfully submits that *Rodriguez* misapprehended *Malley-Duff* because the First Circuit voiced its concern over loss of evidence and witnesses' memories in response to Justice Scalia's dissenting opinion in *Malley-Duff*, which asserted that no statute of limitations should apply if state codes fail to furnish an appropriate limitations period. 483 U.S. at 155-56 (Scalia, J., dissenting). *Malley-Duff* answered the need for a uniform statute of limitations for civil RICO by establishing a four-year limitations period; however, this Court expressly reserved the limitations issue, thereby emphasizing the importance of separating these issues. *Id.* at 157. Additionally, the concern that an injured plaintiff might have 14 years in which to sue under RICO after defendants committed their first predicate criminal act against him ignores the fact that this right to sue only extends if the defendants continue to commit criminal acts against him (or other victims).<sup>23</sup>

thrift operator Charles Keating), any accrual rule adopted by this Court in this case should consider (if not follow) the principles adhered to in criminal RICO cases.

<sup>23</sup> The *Rodriguez* court concluded its criticism of the breadth accorded by § 1961(5) by stating that "[i]n any event, we do not know why a knowledgeable plaintiff should have [14], rather than four years to bring suit." 917 F.2d at 667. However, in the words of this Court, "this defect - if defect it is - is inherent in the statute as written, and its correction must lie with

**D. Even If Petitioners' RICO Claim Accrued More Than Four Years Before They Filed Suit, Applicable Federal Tolling Doctrines Render Their Claim Timely**

**1. Introduction**

If this Court adopts the "last predicate act" accrual rule, Petitioners' RICO claims are timely. Even if their claims are deemed to have accrued more than four years before they brought suit, however, the running of the statute of limitations should be arrested by application of two distinct tolling doctrines: Equitable estoppel (which includes fraudulent concealment) and equitable tolling. Both tolling doctrines are grafted onto federal statutes of limitations, see *Holmberg*, 327 U.S. at 397, including RICO, see *Grimmett*, 75 F.3d at 514 ("Equitable tolling doctrines, including fraudulent concealment, apply in civil RICO cases."). Unfortunately, these doctrines have generated a great deal of confusion in the lower federal court because courts and parties often mix them with each other and with accrual doctrines, such as the discovery rule. See *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 851-52 (7th Cir. 1996).

The purpose of the discovery rule is to determine the accrual date of a claim in order to ascertain when the statute of limitations begins to run. Equitable estoppel and equitable tolling step in to toll, or stop, the statute from running because of equitable considerations. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-52 (7th Cir. 1990). Under the discovery rule, courts often find that the statute of limitations does not begin to run until the proposed plaintiff learns or should learn that he has been injured. See *Wolin*, 83 F.3d at 852 ("not that he has been

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Congress." *Sedima*, 473 U.S. at 499; see also *United States v. Thomas*, 991 F.2d 206, 215 (5th Cir. 1993) ("Actual or potential aberrant results, however, do not excuse reading (or writing) anything into or out of a statute that Congress has so consciously adopted.").

wronged, just that he has been injured"). When a potential plaintiff knows of an injury, but not that it was *wrongfully caused*, a tolling doctrine should suspend the statute's running. But simple knowledge of an injury might also result in a finding that the cause of action itself had not accrued until the potential plaintiff knew (or should have known) of both the injury *and* the wrongdoing.<sup>24</sup>

Fraudulent concealment, a branch of equitable estoppel, exists when the wrongdoer takes affirmative steps beyond the original wrongdoing to prevent or delay its discovery, and it encompasses wrongful acts that are "self-concealing" and acts of "active concealment."<sup>25</sup> Cases addressing "active concealment" and "self-concealing" wrongs often focus on a single wrongful episode; however, a pattern of racketeering activity may include wrongful acts which both conceal an original wrong and,

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<sup>24</sup> See *Bailey v. Glover*, 88 U.S. 342, 349 (1875) ("[W]e hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute *does not begin to run* until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.") (emphasis added); *Nevada Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1307-08 (9th Cir. 1992).

<sup>25</sup> Fraudulent concealment applies only to the latter, while the former is within the province of equitable tolling. An act is self-concealing if it was committed during the course of the original fraud and has the effect of concealing the fraud from its victim. Active concealment, on the other hand, involves acts intended to conceal the original fraud that are distinct from that original fraud. See *Wolin*, 83 F.3d at 851-852; *Sprint Communications Co. L.P. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996); *Martin v. Consultants & Administrators*, 966 F.2d 1078, 1094 n.17 (7th Cir. 1992); see also *Hobson v. Wilson*, 737 F.2d 1, 33 & n.102 (D.C. Cir. 1984) (theft of antique vase is complete once taken, while replacing it with fake rendition, whether immediately later, is distinct act of concealment).



at the same time, establish elements of the violation itself. *Supermarket of Marlinton v. Meadow Gold Dairies*, 71 F.3d 119, 122 (4th Cir. 1995) (antitrust case recognizing that "affirmative acts" that conceal violation may also be part of violation).

When a wrongdoer has engaged in *active* concealment, there is disagreement concerning whether or not the victim is required to exercise due diligence to discover his claim.<sup>26</sup> As Judge Posner has pointed out, however, the disagreement, "may be apparent rather than real" because equitable tolling requires due diligence and "the cases often run equitable tolling and equitable estoppel together." *Wolin*, 83 F.3d at 852.

In addition to fraudulent concealment, *equitable estoppel* also includes conduct that, while not concealing the original fraud, wrongfully prevents the prospective plaintiff from suing in time, such as threatening plaintiff or promising not to plead statute of limitations as a defense. *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 347 (2d Cir. 1994). Equitable tolling differs from equitable estoppel because the wrongdoer, while responsible for the underlying wrong, is *not* responsible for the victim's delay in bringing suit. The victim is required to continuously exercise due diligence and, if he does not, he cannot invoke equity to avoid the time bar.

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<sup>26</sup> Compare *Robertson v. Seidman & Seidman*, 609 F.2d 583, 593 (2d Cir. 1979) ("the active concealment of fraudulent conduct tolls the statute of limitations in favor of the defrauded party until such time as he actually knew of the fraudulent conduct of the opposing party") with *J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1259 (1st Cir.) ("the fraudulent concealment doctrine will not save a charging party who fails to exercise due diligence, and is thus charged with notice of a potential claim"), *cert. denied*, 117 S. Ct. 81 (1996). See also *Wolin*, 83 F.3d at 852 (plaintiff's actual knowledge required); *Riddell*, 866 F.2d at 1491 (same); *Pinney Dock & Transp. Corp. v. Penn Cent. Corp.*, 838 F.2d 1445, 1465 (6th Cir. 1988) (burden of demonstrating due diligence rests on plaintiff).

Courts apply a "reasonable person" standard in this context. *Chakonas v. City of Chicago*, 42 F.3d 1132, 1135 (7th Cir. 1994). If a reasonable person in similar circumstances would not have been aware of the basis of the claim, equitable tolling is appropriate. *Id.* This is, of course, a fact-sensitive inquiry that will depend on the unique circumstances of each case. See *Jones v. Childers*, 18 F.3d 899, 909 (11th Cir. 1994).<sup>27</sup>

Equitable estoppel and equitable tolling are also distinguishable by the amount of time that they allow for a prospective plaintiff to bring the action. If equitable estoppel is established, plaintiff has the *full* statutory period in which to sue after the wrongful conduct had ceased to impede him. *Wolin*, 83 F.3d at 852-53. For equitable tolling, however, once the cause of action is discovered, plaintiff must bring suit as soon as he or she is reasonably able to do so. *Phillips*, 984 F.2d at 492. If the discovery rule is applied, the claim will be deemed to have accrued when the injury (or in some cases wrongdoing) is discovered and the plaintiff will have the full statutory period to bring suit. *Wolin*, 83 F.3d at 852; *Nevada Power*, 955 F.2d at 1307-08.

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<sup>27</sup> Equitable tolling is commonly applied in fraud cases because fraud is often difficult to discover, even when the wrongdoer makes no special effort to cover it up. See *Wolin*, 83 F.3d at 852 ("[U]nlike being hit over the head by a baseball bat wielded by a known assailant, fraud is secretive by nature."). Equitable tolling encompasses a broader range of conduct than equitable estoppel and it is generally appropriate when the circumstances that cause the plaintiff to miss a filing deadline are out of his or her hands. *Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993).



## 2. Genuine Issues Of Material Fact Relative To These Tolling Doctrines Should Have Precluded The Entry Of Summary Judgment In Favor Of Respondents

In granting summary judgment for Respondents, the district court incorrectly found that there was no fraudulent concealment because defendants did not take affirmative steps preventing discovery of the facts establishing the cause of action. 875 F. Supp. at 1350-51 & 1352 n.6. In affirming, the Eighth Circuit also presumed application of due diligence standards to Petitioners' fraudulent concealment claim, stating that "the Klehrs' lack of diligence precludes us from tolling the statute of limitations due to fraudulent concealment." 87 F.3d at 238. The purported lack of due diligence was also grounds for rejecting their equitable tolling claim. 87 F.3d at 239 n.11.

Summary judgment is improper "if tolling of the statute of limitations requires the resolution of disputed factual issues." *Aragon v. Federated Dep't Stores, Inc.*, 750 F.2d 1447, 1449 (9th Cir. 1985). Issues concerning fraudulent concealment and due diligence are inherently factual in nature and generally unsuited for resolution on summary judgment. *Hines v. A.O. Smith Harvestore Prods., Inc.*, 880 F.2d 995, 999 (8th Cir. 1989); *Durham v. Business Management Assocs.*, 847 F.2d 1505, 1509-10 (11th Cir. 1988). While Petitioners knew that they were encountering health problems with their cattle herd, a reasonable jury could conclude that Respondents' post-sale conduct was designed "to convince [the victims] that the defendant[s] ha[ve] not made any misrepresentations or misleading omissions, or otherwise to dissuade [them] from suing." *Wolin*, 83 F.3d at 852.

The courts below confused Respondents' concealment of the Harvestore's *design defects* with concealment of their *false representations*. While the silo (complete with design defects) may have been situated on Petitioners' property, the record demonstrates that Respondents took

extensive affirmative steps to conceal the false and misleading nature of their continuing representations to Petitioners and other purchasers.<sup>28</sup> The record does not irrefutably demonstrate that Petitioners discovered or should have discovered Respondents' fraudulent conduct earlier than they did, rendering summary judgment improper. Cf. *Nevada Power*, 955 F.2d at 1307-08 (even though plaintiff knew that defendant's 1979 representations were false, there was no reason to believe that they were anything other than innocent mistakes until 1988, when disclosure of defendant's internal documents demonstrated willfulness).

## 3. When The Wrongdoer Has Engaged In Fraudulent Concealment, The Victim's Lack Of Diligence Should Not Preclude Application Of Equitable Estoppel

When the wrongdoer has engaged in active concealment, a fraud victim's lack of due diligence does *not* preclude application of equitable estoppel. Once a trial court determines that fraudulent concealment has been demonstrated, equitable estoppel bars a defendant from invoking the statute of limitations. Fraudulent concealment concerns not the diligence of the plaintiff but the misdeeds of the defendant. *Wolin*, 83 F.3d at 852. As to whether the wrongdoer's fraudulent concealment contributed to the victim's lack of diligence, the victim – not the wrongdoer – should be given the benefit of the doubt.

<sup>28</sup> It is wholly unrealistic to expect that Petitioners had the ability to and detect a design defect in a silo and, upon doing so, to deduce that the continuing representations made to them in connection with their purchase were wilfully false. Even if Petitioners could have made this deduction, Respondents' post-sale fraudulent statements repeated and reinforced (and thereby concealed) the false information that induced purchase of the silo in the first place.

Requiring due diligence of a victim of fraudulent concealment improperly focuses on the very vulnerabilities that made the victim the wrongdoer's prey in the first place. In equity, a wrongdoer should not be rewarded for choosing his victim well.

Accordingly, once a plaintiff raises a genuine issue of material fact as to fraudulent concealment, *defendants' burden is to demonstrate that plaintiff had actual knowledge of the cause of action beyond the limitations period. Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996).

#### 4. In This Case, There Are Genuine Issues Of Material Fact Concerning Petitioners' Exercise Of Due Diligence

The record demonstrates that Respondents' fraudulent scheme was self-concealing and that application of equitable tolling is appropriate. If this Court addresses Petitioners' exercise of due diligence in the context of equitable tolling (or, if required, in the context of fraudulent concealment), it should find that summary judgment was inappropriate because a reasonable jury could find that Petitioners exercised due diligence in discovering the fraud.<sup>29</sup>

In addition, relying on Minnesota law, the lower courts placed the burden on *Petitioners* to demonstrate due diligence in the fraudulent concealment context and this analysis carried through to the Eighth Circuit's consideration of equitable tolling; however, "the burden of showing reasonable diligence [is on] the *defendant* when

<sup>29</sup> Petitioners made routine repairs to the silo which did not reveal its design flaws. The owner's manual warned Petitioners not to go inside the silo because there was not enough oxygen to support life. Petitioners discovered that the silo was the cause of their injury in March 1991, when a university professor they had consulted conducted an investigation.

plaintiff alleges that the statute is tolled by a self-concealing wrong". *J. Geils Band*, 76 F.3d at 1259. Therefore, the burden concerning due diligence for equitable tolling purposes was placed on the wrong party.<sup>30</sup>

<sup>30</sup> If, contrary to NASCAT's position, this Court holds that plaintiff must exercise due diligence when defendant has engaged in fraudulent concealment, it should, at a minimum, place the burden of establishing a lack of due diligence on *defendant*. Otherwise, the incongruous result might be that defendant has the burden of proof on plaintiff's lack of due diligence when there is *no* fraudulent concealment, but plaintiff has the burden demonstrating his or her due diligence when defendant has engaged in active concealment. See *J. Geils Band*, 76 F.3d at 1259. In other words, *there is a procedural advantage for the wrongdoer who engages in fraudulent concealment. Cf. Urland v. Merrell-Dow Pharm., Inc.*, 822 F.2d 1268, 1281 (3d Cir. 1987) (Becker, J., dissenting).



## II. CONCLUSION

For the reasons stated herein, the decision of the court below should be reversed.

DATED: February 20, 1997

Respectfully submitted,

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**MAR - 5 1997**

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**NO. 96-663**

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**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1996**

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**MARVIN KLEHR AND MARY KLEHR, Petitioners  
v.  
A. O. SMITH CORPORATION AND  
A. O. SMITH HARVESTORE PRODUCTS, INC., Respondents**

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**On Writ of Certiorari to the United States  
Court of Appeals for the Eighth Circuit**

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**MOTION TO ALLOW LATE FILING  
OF BRIEF *AMICUS CURIAE***

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MARVIN KLEHR AND MARY KLEHR,  
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**MOTION TO ALLOW LATE FILING  
OF BRIEF *AMICUS CURIAE***

NOW COME *amici curiae*, Plaintiffs' Executive Committee, MDL 1069 and David S. Forbes, et al, and respectfully request that this Honorable Court allow late filing of a brief *amicus curiae* in the above-captioned matter. In support thereof, *amici* state as follows:

1. Through accident, mistake and misfortune, *amici* relied on the provisions of Supreme Court Rule 29.2 rather than the particular provisions of this Court's order of January 10, 1997 stating that that rule is inapplicable.

2. Thus, the brief *amicus curiae* was postmarked by the deadline of February 21, 1997 but was not received by this Honorable Court by 3:00 p.m. on that date.
3. No party will be prejudiced by the short delay, consisting of two or three business days, in filing the brief *amicus curiae*. The brief *amicus curiae* brings to the attention of this Honorable Court relevant matter and argument not already brought to its attention by the parties. Therefore, justice would be served by allowing this motion.
4. Petitioner and respondent consent to the relief requested in this motion.

WHEREFORE, *amici* Plaintiffs' Executive Committee, MDL 1069 and David S. Forbes, et al, request that this Honorable Court:

- A. Grant leave for late filing of their brief *amicus curiae* in the above-captioned appeal; and
- B. Grant such other and further relief as may be just and equitable.

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NO. 96-663

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**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1996**

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**MARVIN KLEHR AND MARY KLEHR, Petitioners**

**v.**

**A. O. SMITH CORPORATION AND**  
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**On Writ of Certiorari to the United States Court of Appeals**  
**for the Eighth Circuit**

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**BRIEF AMICUS CURIAE OF PLAINTIFFS'**  
**EXECUTIVE COMMITTEE, MDL NO. 1069, AND OF**  
**DAVID S. FORBES, ET AL**

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## **BRIEF AMICUS CURIAE OF PLAINTIFFS' EXECUTIVE COMMITTEE, IN RE AMERICAN HONDA MOTOR CO., INC. DEALERSHIPS RELATIONS LITIGATION MDL NO. 1069, AND DAVID S. FORBES, ET AL.**

### INTEREST OF AMICI CURIAE

#### **I. Plaintiffs' Executive Committee, Honda Litigation**

Plaintiffs' Executive Committee, *In re American Honda Motor Co., Inc. Dealer Relations Litigation*, MDL 1069, represents approximately 50 Honda and Acura dealers who have brought racketeering actions against American Honda, Honda North America, Honda Limited (the Japanese parent of American Honda), and numerous Honda executives, employees and non-Honda employee co-conspirators. All of these cases have been referred by the Judicial Panel on Multi-District Litigation to the United States District Court for the District of Maryland.

These cases stemmed from a civil case brought in the United States District Court for the District of New Hampshire by a terminated Acura automobile dealer. In February, 1993, after hearing evidence of bribery in that case, *Nault v. American Honda Motor Co.*, D. N.H. No. 89-384M, the United States District Court for the District of New Hampshire (McAuliffe, J.) referred the matter to the United States Attorney for that District. Investigation by the United States Attorney resulted in 13 indictments of Honda employees in March, 1994.

The indictments alleged that the defendant executives of American Honda had engaged in a kickback and bribery scheme between 1979 and 1992 to accept bribes from certain Honda and Acura dealers in exchange for franchises, increased allocation of cars, and favorable treatment. The criminal case against the Honda executives was described by the press as the largest commercial bribery case in United States history (*Los Angeles Times*, August 22, 1995, p. D6).

Dealers injured by the bribe-based allocation system brought suit in a variety of federal district courts alleging violations of Racketeer Influenced and Corrupt Organization ("RICO"), the Robinson-Patman Act, the Auto Dealers Day in Court Act, breach of contract, and various state law claims. In August, 1995, the Panel on Multi-District Litigation referred these cases to Chief Judge J. Frederick Motz of the United States District Court for the District of Maryland.

The Honda defendants in this civil action have indicated their intent to file motions to limit liability based upon statute of limitation rules. Plaintiffs have little doubt that such motions will be unsuccessful, because they believe the court will, after extensive evidentiary hearings, find that fraudulent concealment, equitable tolling and equitable estoppel prohibit assertion of such a defense. However, in an effort to eliminate this further expense and delay in obtaining a remedy, the plaintiff *amici* appear in this litigation to urge this Court to adopt the sound civil RICO accrual rule of *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988).

## II. David S. Forbes, et al

*Forbes v. Eagleson*, E.D. Pa. Civ. No. 95-7021, is a RICO class action on behalf of all professional hockey players

who played for NHL teams from 1975 through 1991. The defendants include R. Alan Eagleson, former executive director of the hockey players' union, the National Hockey League Players' Association ("NHLPA") and the NHL team owners. The complaint alleges that from 1975 through 1991, Eagleson received a continuous stream of bribes, in violation of 29 U.S.C. § 186, from team owners. The owners controlled Eagleson through these bribes, thereby keeping the union weak and the players perennially underpaid.

The bribe scheme centered around a series of international hockey tournaments organized by Eagleson beginning in the mid-1970's. The tournaments included all-star teams from Canada and the United States made up of many of the best NHL players. Eagleson convinced the NHL owners to allow the players, otherwise prohibited by their contracts from playing outside the NHL, to play in the tournaments. He also persuaded the players, to whom he was a fiduciary and over whom he exercised virtual total control, to play in the tournaments. Year after year, the owners permitted Eagleson to control the tournaments' finances on their behalf. It is now known that, at least until the end of 1991, Eagleson skimmed a substantial portion of the tournament profits himself.

During the entire time period from the mid-1970's until 1992, and indeed to the present, the owners either knew Eagleson was pocketing their money, or, in the alternative, even though they were on notice of his financial self-dealing, they never asked Eagleson for an accounting. In return, Eagleson sold out the players' interests at the labor bargaining table and in individual negotiations, causing the players hundreds of millions in lost compensation, most of which resulted in increased profits to the owners and some of which found its way into Eagleson's pocket.

As in most labor racketeering schemes, the bribe arrangement between the owners and Eagleson was sophisticated, subtle and secret. For that reason and because Eagleson ran the NHLPA with dictatorial control, intimidating the players from questioning his decisions, he and the owners were able to conceal the bribe scheme for years. It was not until 1994 that the District of Massachusetts issued a RICO indictment, in *United States v. Eagleson*, D. Mass. No. 94-10054-N17G, charging Eagleson with embezzling from the NHLPA, that the players had actual documentation of the bribe pattern.

*Forbes v. Eagleson* was filed in the Eastern District of Pennsylvania on November 7, 1995, within four years after Eagleson's resignation as Executive Director of the NHLPA. That Court (O'Neil, J.) denied the owners' motion to dismiss based on the statute of limitations, applying the civil RICO accrual rule of *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). *Forbes v. Eagleson*, E.D. Pa. Civ. No. 95-7021 (July 23, 1996). *Amici* urge that the same rule be adopted by this Court.

### SUMMARY OF ARGUMENT

RICO originated as a criminal statute which was designed to facilitate prosecutions of complex criminal organizations. RICO gives prosecutors many of the procedural and evidentiary advantages they wield in prosecuting conspiracies. Chief among these is a statute of limitations which does not accrue until the last overt act is committed in furtherance of the RICO enterprise. *See* Part I,A.

RICO is also a remedial statute. RICO's civil remedies were designed to empower civil plaintiffs as private attorneys

general to "fill prosecutorial gaps" in bringing racketeers to justice. In light of this intent, these plaintiffs should be given a statute of limitations accrual comparable to that provided to prosecutors of criminal racketeering. *See* Part I,B.

*Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988) held that a civil RICO claim accrues when plaintiff knew or should have known of the last predicate act in the RICO pattern. This rule most closely embodies Congress' intent in giving civil plaintiffs quasi-prosecutorial remedies against racketeering. The *Keystone* rule also is appropriate because it allows a RICO victim to recover for all injuries caused by a pattern of racketeering, even those occurring prior to the limitations period. Finally, *Keystone* will ease the judicial task by dispensing with the lengthy and fact-intensive hearings, necessary to address tolling under other accrual rules. For these reasons, *Keystone* is appropriate as a national rule of civil RICO accrual. *See* Part II.

The "injury discovery" accrual rule does not give civil plaintiffs adequate opportunity to discover the critical "pattern" of racketeering. A pattern of racketeering may take years to occur, let alone be discovered and pled with sufficient particularity to satisfy Fed. R. Civ. P. 9(b). If plaintiffs are held to a rule whereby their RICO claim accrues at the first knowledge of injury, then a RICO claim could be time barred before it even exists. *See* Part III,A.

The pattern is too essential to a RICO claim, and the inequity of an accrual rule that gives it short shrift is too glaring, to be cured by a separate tolling doctrine. Reliance on a tolling rule will result in lower courts' unnecessarily being forced to decide complex legal and factual issues to determine whether any RICO claim can proceed. *See* Part III,B.



The "pattern discovery" accrual rule will still burden the District Courts with lengthy and expensive fact-finding as to which of several tolling doctrines should apply, in addition to fixing the point of accrual itself. Further, the Court of Appeals read a "new and independent injury" element into the pattern discovery rule, which it interpreted overly narrowly. *Keystone's* accrual rule avoids these pitfalls and is therefore superior to the pattern discovery rule. See Part III, C.

Finally, the Clayton Act does not furnish the proper model for accrual of a RICO claim. A claim accrues under the Clayton Act upon each discrete injurious act. An accrual rule framed upon singular, discrete acts cannot govern RICO claims, which by their nature must allege a continuous spectrum of related acts. See Part III, D.

The Third Circuit's accrual rule most effectively reflects RICO's criminal history and its remedial goals, and *amici* urge this Court to adopt it.

## **ARGUMENT**

### **I. RICO's Purpose Supports an Expansive Rule of Accrual**

#### **A. RICO Originated as a Criminal Statute**

Definition of civil RICO's statute of limitations rule of accrual must begin with an examination of the statute's criminal origins. RICO represented an entirely different model of understanding and combating crime. The traditional model was to investigate crime on an occurrence-by-occurrence basis, and to prosecute and incarcerate the perpetrator of each individual crime. In order to account for crime's increasing

organization and complexity, RICO identifies crimes described as "a course of conduct involving relationships with criminal groups rather than as a single moral act." Lynch, *RICO: The Crime of Being a Criminal* (pts. 3 & 4), 87 Colum.L. Rev. 920, 952-53 (1987).

Along with this change in focus, RICO endows prosecutors with powerful advantages. These include forfeiture of the defendants' interest in the racketeering enterprises, 18 U.S.C. § 1963(a), the psychological prejudice of answering to the pejorative charge of "racketeering", and extension of the statute of limitations for as long as the defendant commits predicate acts in furtherance of the enterprise. *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *cert. denied sub nom. Russo v. United States*, 486 U.S. 1022 (1988), 100 L. Ed.2d 277, 108 S. Ct. 1995 (1988); *United States v. Pepe*, 747 F.2d 632, 633 (11th Cir. 1984).

These advantages have not gone uncriticized. The criticism of the latitude bestowed by RICO on prosecutors, see B. Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Fordham L. Rev. 165 (1980), is reminiscent of the debate earlier in this century over conspiracy prosecutions, the original "darling of the prosecutor's nursery". *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (L. Hand, J.).

The advantages which made conspiracy the darling of the prosecutor's nursery were abundant. Venue in a conspiracy case is proper wherever any overt act is committed. *Hyde v. United States*, 225 U.S. 347, 360-64, 56 L. Ed. 1114, 32 S. Ct. 793 (1912). The scope of the conspiracy may be inferred from circumstantial evidence. *Blumenthal v. United States*, 332 U.S. 539, 549, 91 L. Ed. 154, 164, 68 S. Ct. 248 (1947). Hearsay in furtherance of the conspiracy is admissible against

co-conspirators. *Krulewitch v. United States*, 336 U.S. 440, 443, 93 L. Ed. 790, 794, 69 S. Ct. 43 (1949). Thus, the demonstrated guilt of some defendants may "spill over" to others tried jointly. *Kotteakos v. United States*, 328 U.S. 750, 774-75, 90 L. Ed. 1557, 1571-1572, 66 S. Ct. 1239 (1946).

Tying together all of conspiracy's procedural and evidentiary advantages to prosecutors is a lengthened statute of limitations. The longer a conspiracy is deemed alive, the more of these advantages a prosecutor can claim. The statute of limitations in a criminal conspiracy does not run until the performance of the last overt act furthering the conspiracy. *Grunewald v. United States*, 353 U.S. 391, 404, 1 L. Ed.2d 932, 939, 77 S. Ct. 963 (1957); *Hyde v. United States*, 225 U.S. 347, 56 L. Ed. 1114, 1127, 32 S. Ct. 793 (1912).

The relaxed procedural and evidentiary rules available in prosecuting conspiracies led many to fear conspiracy's growth from darling of the nursery to maniacal schoolyard bully. See, e.g., *Krulewitch*, *supra* at 445-449, 93 L. Ed at 795-801 (Jackson, J. concurring, describing conspiracy as "that elastic, sprawling and pervasive offense."). Nevertheless, conspiracy prosecutions gained importance and acceptance. This acceptance was premised on the belief that the increased potency of a conspiracy prosecution was commensurate with the increased threat posed by crimes forethought and coordinated by conspirators as compared to the same crimes randomly committed by independent individuals. See, e.g., *Callanan v. United States*, 364 U.S. 587, 593-94, 5 L. Ed.2d 312, 317, 81 S. Ct. 321 (1961); *Pinkerton v. United States*, 328 U.S. 640, 646, 90 L. Ed. 1489, 1496, 66 S. Ct. 1180 (1946).

The parallels to RICO are obvious. For that reason, looking to conspiracy law, courts in substantive criminal RICO

cases start the limitations clock running at the defendant's last predicate act in furtherance of the enterprise. *United States v. Persico*, 832 F.2d 705, 713-14 (2d Cir. 1987), *cert. denied* 486 U.S. 1022, 100 L. Ed.2d 227, 108 S. Ct. 1996 (1988). A RICO conspiracy charge may be brought within five years after the conspirators have achieved or abandoned their purpose. *Id.*; *United States v. Torres Lopez*, 851 F.2d 520, 525 (1st Cir. 1988), *cert. denied* 489 U.S. 1021, 103 L. Ed.2d 204, 109 S. Ct. 1144 (1989). The defendant may be charged with predicate acts extending back the length of the enterprise as long as the last predicate act occurred within five years of the indictment. *Persico*, *supra*; *United States v. Vogt*, 910 F.2d 1184, 1195-96, (4th Cir. 1990), *cert. denied* 498 U.S. 1083, 112 L. Ed.2d 1043, 111 S. Ct. 955 (1991). These cases all trace their reasoning to "continuing violation" criminal cases, which measure the limitations period from the point at which the crime is complete. See, *Persico*, *supra*, citing *Toussie v. United States*, 397 U.S. 112, 115, 25 L. Ed.2d 156, 90 S. Ct. 858 (1970). This same accrual model should apply in civil RICO actions.

## B. RICO is a Remedial Statute

In a portion of the statute that remains uncoded, Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes." Section 904(a) of Pub. L. No. 91-452, 84 Stat. 947. "The statute's remedial purposes are no where more evident than in the provision of a private action for those injured by racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98, 87 L. Ed.2d 346, 359-60, 105 S. Ct. 3275 (1985). RICO's power as a criminal statute and its expansive interpretation as a civil remedy are simply two edges to the same weapon against racketeering, since "[p]rivate attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps." *Sedima*, *supra* at 493, 87

L. Ed.2d at 357<sup>1</sup>. If civil plaintiffs are to act as private attorneys general in bringing racketeers to justice, they should be given a statute of limitations accrual which enables them to be as effective as prosecutors of criminal RICO.

Even a cursory review of legal history reveals a gradual divergence of the public and private consequences of criminal acts. The separation of public and private rights began to cause profound societal concern by the mid-1970's. By the end of the 1970's, the interest of victims of violent crime had come to the attention of the courts and the public. Victims' rights statutes, such as rape shield statutes, first protecting privacy interests, began to appear. In the last ten years, statutes which give victims input in the sentencing process itself were enacted by the Congress and in virtually every state. See, e.g., 18 U.S.C. § 3553(7). RICO itself, and the evident Congressional intent to allow its expansive use in civil cases, reflects Congress' concern with the illegal use of aggregations of economic power and with providing a remedy to victims of crime. It would be patently inconsistent with the trend of vindicating crime victims to apply to RICO a restrictive accrual rule limiting the ability of injured parties to recover their damages.

*Amici* respectfully urge the Court to adopt the accrual rule which is truest to RICO's history as a criminal statute and to its self-consciously remedial purpose: that a civil RICO action accrues when plaintiff reasonably becomes aware of the enterprise's last overt act.

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<sup>1</sup> On July 2, 1996, the President signed into law the Anticounterfeiting Consumer Protection Act of 1996, 104 P.L. 153, 100 Stat. 1386. The Act strengthens the hand of private business against video and software piracy by, among other measures, making such piracy a RICO predicate act. This statute demonstrates the belief of both the Executive and Legislative branches in the continued necessity and vitality of civil RICO's remedial purposes.

## II. The Third Circuit's "Last Predicate Act" Rule Promotes RICO's Purposes

### A. *Keystone* Most Closely Embodies Congressional Intent

*Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988) was one of the first cases from the Circuit Courts of Appeals decided after *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 154, 97 L. Ed.2d 121, 132, 107 S. Ct. 2759 (1987) to address the question left open by that decision, namely, when a civil RICO action accrues. It ruled that a RICO action accrues when plaintiff knew or should have known of the last injury or the last predicate act of the complained-of racketeering pattern. 863 F.2d at 1130.

*Keystone* discerned in the statutory language and in this Court's opinions three essential themes in developing a civil RICO accrual rule. First, a civil RICO claim has several unique elements which differentiate it from a claim for the underlying predicate acts -- for example, the enterprise and the pattern -- and the discovery rule should apply to each one. 863 F.2d at 1130. Second, the nature of a RICO violation is such that Congress must have intended that it be treated as continuing, and is not likely to have intended the civil claim to accrue before the crime was complete. *Id.* at 1131. Finally, the Third Circuit took to heart Congress' mandate that RICO "shall be liberally construed to effectuate its remedial purpose." *Id.* at 1128, citing Organized Crime Control Act, Pub. L. No. 91-452 § 904(a), 84 Stat. 942, 947 (1970).

The *Keystone* rule is most true to Congress' intent to protect and empower the victims of racketeering because it



ensures that plaintiffs (such as *amici*) will not be foreclosed from their claims while still unaware of them. *Keystone* simply allows defendants by their own continuing wrongful actions to postpone accrual of the cause of action that will remedy those wrongs. Not coincidentally, this accrual rule is the same applied in criminal RICO prosecutions, bringing to bear Congress' intent to allow civil plaintiffs to fight racketeering in situations where the Government for good reasons may decline to bring indictments.

*Amici* submit that *Keystone*'s conformance to RICO's history as a criminal statute, as well as its inherent fairness, favor its adoption as the national civil RICO accrual rule, and urge this Court to do so.

#### B. *Keystone* Recognized the Importance of Capturing All Predicate Acts

Importantly, *Keystone* recognized that, once a complaint is deemed timely, the plaintiffs should be allowed to recover for injuries dating from the beginning of the pattern, even if those injuries are beyond the limitations period. 863 F.2d at 1183-33. Again, this holding is the result of careful examination of Congress' intent in enacting the statute. The Court recognized that 18 U.S.C. § 1961(5) requires of a pattern only that it consist of two predicate acts within ten years, and continued:

It would be inconsistent with this breadth of definition for us to state that we will look to the past ten years to see if a civil RICO claim exists but if we find ten years of racketeering activity, all related and all perpetrated by the same defendants, we will provide a remedy only to those who were victimized within the past four

years. To do so would encroach upon and limit a legislatively-enacted scheme to provide recovery for racketeering injuries.

863 F.2d at 1133, citing 18 U.S.C. §§ 1961(5), 1964(c).

*Keystone*'s conclusion in this regard is neither startling nor unprecedented. *Keystone* drew on thirty years of cases applying accrual rules to federal statutory causes of action involving patterns of wrongful conduct or injury. For example, *Keystone* recognized that in sex discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, plaintiff has a 180 day statute of limitations before filing a complaint with the EEOC. However, plaintiff can recover for earlier incidents if she can demonstrate a pattern of discrimination, the last act of which occurred within the limitations period. See, e.g. *Held v. Gulf Oil Co.*, 684 F.2d 427, 430 (6th Cir. 1982); *Acha v. Beame*, 570 F.2d 57, 65 (2d Cir. 1978), cited in 863 F.2d at 1129. See also, *Cornwell v. Robinson*, 23 F.3d 694, 703-04 (2d Cir. 1994); *West v. Philadelphia Electric Co.*, 45 F.3d 744, (3d Cir. 1995) (approving relation back where plaintiff alleges pattern of discrimination).

*Keystone* also found support for capturing a pattern of conduct for statute of limitation purposes in a long-standing Third Circuit case interpreting the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* *Fowkes v. Pennsylvania Railroad Company*, 264 F.2d 397 (3d Cir. 1959) had no difficulty in finding plaintiff's action timely where his injuries had resulted from a pattern of repetitive injuries, at least some of which occurred within the FELA's three-year limitations period. 264 F.2d at 399, cited in *Keystone* at 863 F.2d at 1129.

In addition to *Keystone*'s examples, federal courts have allowed complaints to relate back and capture lengthy patterns of wrongful conduct in other familiar statutory contexts. The Fair Housing Act of 1968, 42 U.S.C. § 3612(a), specifically contemplates such relation back. Under that statute, plaintiff must file a suit within 180 days of the alleged discriminatory housing practice. However, if plaintiff can demonstrate a pattern of discrimination, the last act of which occurred within 180 days prior to filing suit, she may recover for damages arising out of the entire pattern. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81, 71 L. Ed.2d 214, 230, 102 S. Ct. 1114 (1982). "Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act...." 455 U.S. at 380, 71 L. Ed.2d at 230.

These cases demonstrate that federal courts have for years been successfully applying accrual rules to complaints alleging patterns of statutorily prohibited conduct. No different accrual rule need apply simply because the statute violated is RICO. *Keystone* correctly applied to a RICO case the same relation back doctrine which has governed federal statutory "pattern" causes of action for decades.

Forbidding relation back would assume that Congress intended that criminals could be jailed for RICO violations for which they could not be sued, because those acts occurred too early in the pattern of racketeering to be timely under a civil complaint. One would have to find strikingly explicit support in RICO's language or history to accept this anomalous result; there is none. Instead, the statute's history and purpose, as noted above, are to give civil plaintiffs powers complementary

to those of criminal prosecutors. The only reasonable conclusion from this history and purpose is to allow a civil RICO complaint to allege *all injurious acts* of the pattern, as long as one of those acts fell within the limitations period.

### C. *Keystone* is Amenable to Practical Application

*Keystone* solves one immense practical problem encountered by all of the other Circuits, namely, lengthy and expensive satellite litigation to determine how much plaintiff knew of her cause of action and when. In this regard, it is important to remember that the District Court's accrual inquiry will be complex because the burden on the plaintiff to allege a pattern is complex. A finding that plaintiff knew of one or two, or several, predicate acts against her will not end the District Court's inquiry, because in order even to state a RICO pattern, the plaintiff will have to be aware of many continuous and related predicate acts spanning at least one year. See, e.g., *Religious Technology Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992) (finding no case allowing pattern under one year); *Marshall-Silver Construction Co. v. Mendel*, 894 F.2d 593, 597 (3d Cir. 1990) (seven months insufficient); *Hindes v. Castle*, 937 F.2d 868, 874-75 (3d Cir. 1991) (eight months insufficient). In addition, since various Courts of Appeal require that predicate acts target more than one victim before they amount to a pattern, see, e.g., *Vemco, Inc. v. Camardella*, 23 F.3d 129 (6th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 130 L.Ed.2d 495, 115 S. Ct. 579 (1994); *Wade v. Hopper*, 993 F.2d 1246, 1251 (7th Cir.) cert. denied, 510 U.S. 868, 126 L. Ed.2d 151, 114 S. Ct. 193 (1993), the District Court will have to consider whether and when plaintiff became aware that the pattern of racketeering claimed other victims as well.

The facts presented by *amici* demonstrate *Keystone's* practical applicability to real-world, long-term criminal conspiracies. In both of *amici's* cases, a decade-long pattern of bribery subverted a legitimate business enterprise, so that the enterprise operated to harm *amici's* business interests. None of the predicate acts of bribery ever became stale, because the subverted individuals, Eagleson and the Honda executives, remained at the bribers' beck and call over the entire duration of the scheme. *Keystone's* delay of accrual until the last predicate act recognizes the cumulative and indivisible subversive effect of this pattern of bribery. Its application will not unduly sacrifice the respective defendants' interest in repose. Statutes of limitation protect defendants from arguing over wrongs long past. If a defendant continues despite plaintiff's knowledge to commit criminal acts up to within four years of the complaint, no policy is advanced by insulating that defendant from her earlier crimes.

A parsimonious accrual rule adopted on the misperception that Petitioners here should have pieced together a few predicate acts and recognized a pattern may have the unintended result of diluting the "continuity plus relationship" pattern requirement that this Court labored so diligently to express in *H.J., Inc. v. Northwestern Bell*, 492 U.S. 229, 106 L. Ed.2d 195, 109 S. Ct. 2893 (1989). Thus, practical as well as equitable considerations favor *Keystone's* adoption as the national civil RICO accrual rule, and *amici* urge this Court to do so.

### III. Accrual Rules Espoused By Other Circuits Do Not Further RICO's Goals

#### A. The "Injury Discovery Rule" is Unfair

The "injury only" discovery rule, adopted by the First, Second, Fourth, Fifth, Seventh and Ninth Circuits, starts the limitations clock running as soon as plaintiff realizes she has suffered an injury. It gives no heed to whether plaintiff is aware that her injury is due to bad luck, another's simple negligence, or a pattern of racketeering. By ignoring plaintiff's awareness of the pattern, the "injury only" discovery rule threatens to eliminate plaintiff's cause of action before she is aware of all of its elements. Fairness counsels otherwise.

"[T]he heart of any RICO complaint is the allegation of a pattern of racketeering." *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 154, 97 L. Ed.2d 121, 132, 107 S. Ct. 2759 (1987) (emphasis in original). See also *H.J., Inc. v. Northwestern Bell*, 492 U.S. 229, 236, 106 L. Ed.2d 195, 206, 109 S. Ct. 2893 (1989) (describing and interpreting "RICO's key requirement of a pattern of racketeering"). No other criminal statute outlaws a "pattern" of any type of behavior. No other civil remedy requires that plaintiff demonstrate a "pattern" of anything. The concept of "pattern" is unique to, and defines, both civil and criminal liability under RICO.

*Northwestern Bell* established the now-familiar requirements of "continuity" and "relatedness" for pleading a RICO pattern. 492 U.S. at 238-39, 106 L. Ed.2d at 207-08. The Courts of Appeals have appropriately responded to *Northwestern Bell* by demanding additional specificity in civil RICO complaints. No longer are a few fraudulent acts targeted



at one victim for a few months sufficient to allege a RICO pattern. In most Circuits, the pattern must continue for over a year, *Religious Technology Center v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992), and must involve several victims besides the plaintiff. *Vemco, Inc. v. Camardella*, 23 F.3d 129 (6th Cir.) *cert. denied*, \_\_\_ U.S. \_\_\_, 130 L.Ed.2d 495, 115 S. Ct. 579 (1994); *Wade v. Hopper*, 993 F.2d 1246, 1251 (7th Cir.), *cert. denied*, 510 U.S. 868, 126 L.Ed.2d 151, 114 S. Ct. 193 (1993). Fairness dictates that if after *Northwestern Bell* a person wronged by racketeering must plead a complex, multi-targeted pattern of continuous and related acts, that person must be given sufficient time to discover this essential and unique ingredient of her claim.

The inequity of the injury discovery rule is all the more striking in the context of Fed. R. Civ. P. 9(b), which requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Most RICO claims, including those of Petitioners and of *amici*, include as predicate acts mail, wire or securities frauds. Several courts have applied Rule 9(b)'s requirement of particularity to the description of the pattern of predicate acts, such that plaintiff must identify the perpetrator, the recipient, the date, and the manner of each fraudulent act in the pattern. *See, e.g., Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 196 (9th Cir. 1987). The injury discovery rule whipsaws plaintiffs between the statute of limitations and Rule 9(b). By the time plaintiff has discovered the pattern of racketeering and is able to plead a RICO complaint to Rule 9(b)'s satisfaction, more than four years can easily have elapsed since she first felt an injury.

The facts presented by *amici* illustrate poignantly the inequity of the injury discovery rule. The Honda dealer

plaintiffs allege that beginning in 1979, Honda as standard practice awarded scarce automobiles and lucrative Honda dealerships to dealers who paid kickbacks to Honda executives. Plaintiff dealers, like many fraud victims, were the last to know of this arrangement. All had difficulty getting their fair share of allocated Honda automobiles. Some went out of business. However, none of them could have come close to articulating a RICO complaint until the Government issued RICO indictments revealing the staggering scope of the bribery conspiracy in March 1994.

Honda itself has argued that it did not know of, and had no reason to know of, the bribery conspiracy until a former Acura dealer from New Hampshire unearthed evidence of bribes in a civil suit in late 1991. Leaving aside the likelihood that a multi-billion dollar international corporation with its finger on the pulse of the American automobile buying public was unaware that its entire American sales force was on the take, if Honda was unaware of the pattern of racketeering until 1992, then *a fortiori* plaintiff dealers could not have known of it at least until then.

Similarly, Eagleson was the union representative and thus the fiduciary to all of the players. He used his dominant rule to intimidate them from making any real inquiries or challenges to his conduct of the union's affairs. The few players who tried to find out about Eagleson's and the tournaments' financial particulars were repeatedly stonewalled. The players had every incentive to remove Eagleson and stop the bribe scheme had they known about it earlier. However, Eagleson was able to continue the scheme until the end of 1991, by concealing his actions from the players and refusing requests for financial disclosure.

*Amici* were not knowledgeable plaintiffs who sat on their rights for years. Had the Honda dealers filed RICO claims as soon as they noticed their difficulty in obtaining automobiles, or had the hockey players filed as soon as they suffered decreased pay and benefits, as the injury discovery rule would have them do, they would have been subject to dismissal and possibly sanctions. At the time that they were aware of their economic losses, *amici* did not know, and could not plead consistently with Fed. R. Civ. P. 11, that they were "injured", i.e., that the losses resulted from wrong doing.

The injustice of the injury discovery rule is cast in stark relief by this single fact. Indictments were brought against both the Honda executives and Eagleson in 1994, for racketeering acts which extend back into the 1970's. Adoption of the injury discovery rule, or even of the less restrictive "pattern discovery" rule applied below, will require *amici* to litigate issues of limitation of actions which the Government, in prosecuting the criminal cases, did not need to consider.

Such a result is manifestly inconsistent with the purposes of RICO. As Justice Brennan noted in *Sedima*, in holding that a prior conviction requirement would be inconsistent with the remedial purposes of RICO,

Such a rule would severely handicap potential plaintiffs. A guilty party may escape conviction for any number of reasons -- not least among them the possibility that the Government itself may choose to pursue only civil remedies. Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps....This purpose would be largely defeated, and the need for treble

damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice.

473 U.S. at 493, 87 L. Ed.2d at 357 (citations omitted).

At the sentencing hearing of the last Honda executive to appear before him, Chief Judge DiClerico of the United States District Court for the District of New Hampshire, who presided over the Honda criminal trial, expressed his concern that the president of American Honda, Koichi Amemiya, had not been brought before him. Amemiya is a defendant in the civil actions in *Honda Dealer Relations Litigation*. It would be patently inconsistent with the main current of RICO law for this Court to limit civil RICO actions, rather than allowing such actions to be brought to fill prosecutorial gaps.

#### **B. Relying on a Tolling Rule Will Complicate the Judicial Task**

Three tolling doctrines are applicable in most RICO cases which, by their very nature, involve fraud and concealment. *Equitable estoppel* is applicable where a defendant takes affirmative steps to prevent the plaintiff from suing in time. It is distinguished from *fraudulent concealment*, which "denotes efforts by the defendant -- above and beyond the wrongdoing upon which the plaintiff's claim is founded -- to prevent the plaintiff from suing in time." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261, 115 L.Ed.2d 1079, 111 S. Ct. 2916 (1991). The third tolling doctrine is *equitable tolling*, which differs from *fraudulent concealment* in that it does not assume a wrongful effort by the defendant to prevent the plaintiff from suing. It differs from the discovery rule in that the plaintiff is

assumed to know that he has been injured, "so that the statute of limitations has begun to run; but he cannot obtain the information necessary to decide whether the injury is due to wrongdoing, and if so, wrongdoing by the defendant." *Cada*, 920 F.2d at 451.

The lower courts which have adopted the injury discovery rule have recognized that such a rule is likely to cause injustice. The judicial response to the obvious injustice has often been a passing reference to these complex tolling doctrines as a panacea. For example, the Ninth Circuit has acknowledged that "a court wishing to give a plaintiff who knows of her injury time to investigate a pattern can always toll the limitations period." *Grimmett v. Brown*, 75 F.3d 506, 512 (9th Cir.), *cert. granted* \_\_\_ U.S. \_\_\_, 135 L. Ed.2d 1046, 116 S. Ct. 2521, (1996), *cert. dismissed* \_\_\_ U.S. \_\_\_, 136 L. Ed.2d 674, \_\_\_ S. Ct. \_\_\_ (1997), *citing McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992).

*Rodriguez v. Banco Central*, 917 F.2d 664 (1st Cir. 1990) recognized that, where a plaintiff who knows of an injury from one predicate act in year one and learns of the second predicate act only in year six, application of the injury discovery rule could bar a RICO suit before it could be brought. The Court dismissed this concern, by reasoning that in Clayton Act cases, courts "have found the statutes *tolled* by fraudulent concealment." *Id.* at 668 (emphasis in original). The Court added "[o]ne can easily imagine the development of an analogous 'tolling' doctrine in RICO cases." *Id.*

*Rodriguez* was decided in 1990, only seven years ago, but barely at the mid-point from the beginning of wide-spread use of the RICO statute, to the present. *Sedima*, 473 U.S. at 481 n.1, 87 L. Ed.2d 349 n.1, 105 S. Ct. 3275, 3278 n.1. In the last

seven years, RICO's use in civil actions has geometrically expanded and the courts' interpretation of the statute is constantly being refined. Less than eight months ago, Congress amended the statute to expand the available predicate acts to include acts of copyright fraud, 104 P.L. 153, 100 Stat. 1386, demonstrating its belief in RICO's continuing vitality and necessity.

The solution to the potential injustice recognized by all of the lower courts who have considered application of an injury discovery rule is not to force lower courts to make nice fact finding determinations regarding fraudulent concealment, equitable estoppel, and equitable tolling. The doctrines are complex, intricate, and difficult. They will arise in nearly every RICO case because most RICO predicate acts involve fraud. Complicating the procedures to obtain the remedies available under RICO will primarily benefit the criminals who will escape liability for their acts. Such a result would be inconsistent with the clear language of the statute and the trend of the law to protect victims of crime.

A separate tolling rule is unnecessary if this Court adopts the accrual rule announced in *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). The only factual inquiry under *Keystone* is when the last predicate act occurred, and when plaintiff should have been aware of this last predicate act. This is the simplest factual inquiry required under any accrual standard. Thus, by dispensing with a separate tolling doctrine, a *Keystone* standard avoids the cumbersome satellite litigation and circuit splits which would arise under the injury



discovery rule<sup>2</sup>.

**C. The Pattern Discovery Rule As Applied Below is Inadequate**

**1. The Pattern Discovery Rule Does Not Avoid Cumbersome Fact Finding**

The "pattern discovery" rule applied below and adopted by the Sixth, Tenth and Eleventh Circuits fixes the accrual of a RICO cause of action when the plaintiff knows or should know that her injury is caused by a racketeering pattern. This rule gives proper consideration to RICO's defining pattern element, and prevents RICO claims from being cut off by the statute of limitations before they exist. However, its application still entails burdening district courts with the protracted task of determining whether and how to apply a smorgasbord of tolling rules.

For example, the Eighth Circuit adopted the pattern discovery rule in *Granite Falls Bank v. Henrikson*, 924 F.2d 150 (8th Cir. 1991). The same court issued another opinion the same day, also adopting the pattern discovery rule. *Vesta State Bank v. Independent State Bank of Minnesota*, 924 F.2d 155 (8th Cir. 1991). The District Court in *Vesta* on remand held further hearings and dismissed the case on summary judgment, considering and rejecting claims of fraudulent concealment.

<sup>2</sup> Although *Davis v. Grusemeyer*, 996 F.2d 617 (3d Cir. 1993) addressed fraudulent concealment after *Keystone*, it appears to be the exception, rather than the rule. See *Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991); *Arab African Int'l Bank v. Epstein*, 10 F.3d 168 (3d Cir. 1993) (addressing civil RICO statute of limitations post-*Keystone*). *Amici* hockey players defeated in the Third Circuit a motion to dismiss based on the statute of limitations without lengthy examination of tolling doctrines. *Forbes v. Eagleson*, E.D. Pa. Civ. No. 95-7021 (July 23, 1996).

1991 U.S. Dist. Lexis at \*10, \*13. This finding was affirmed on appeal, 1992 U.S. App. Lexis 19777 (8th Cir. 7/6/92). The further proceedings, including the second appeal, consumed 18 months and undoubtedly significant resources of both the parties and the courts involved. In contrast, the *Keystone* standard, by focusing on the last predicate act, would relieve the lower courts from the burden of applying haphazard and overlapping tolling doctrines in addition to deciding the point of accrual itself.

**2. *Klehr* Defined "Independent Injuries" Too Restrictively**

*Klehr* properly recognized that "a civil RICO action accrues with respect to 'each independent injury' to the plaintiff." 87 F.3d at 239, quoting *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154. However, the Court of Appeals declined to consider what Petitioners allege to be independent injuries caused by Respondents' post-sale deceptive advertising because these injuries were not sufficiently "independent".

The Court of Appeals' requirement that the later injuries not only be additional, but qualitatively different from, the injuries caused by the earlier predicate acts, is an unnecessary extension of prior case law, and bears little or no relation to the original statutory language. The "rule" articulated by the Court of Appeals began as the "continuing violation" or "separate accrual" rule expressed in a Clayton Act case, *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 28 L. Ed.2d 77, 92, 91 S. Ct. 795 (1971): "In the context of a continuing conspiracy to violate the antitrust laws...each time a plaintiff is injured by an act of the defendants a cause accrues to him to recover the damages caused by that act and...as to those damages, the statute of limitations runs from the

commission of the act.”

This rule was imported into RICO jurisprudence in *State Farm Mutual Automobile Insurance Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring), and reiterated in *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir. 1988), *cert. denied sub nom. Soifer v. Bankers Trust Co.*, 490 U.S. 1007, 104 L. Ed.2d 158, 109 S. Ct. 1642 (1989). These cases, while recognizing that new injuries from racketeering acts start the limitations clock afresh, declined to allow plaintiffs to relate back more than four years prior to the complaint to allege damage. This result, at odds with the rule applied in criminal RICO, resulted from misplaced conformance to the Clayton Act, which does not specifically contemplate or prohibit a “pattern” of antitrust activity.

*Klehr* has further diverged from RICO’s criminal application by now requiring that the later injuries, in order to restart the limitations clock, must be *qualitatively* different from those suffered earlier in the pattern. This requirement appears in RICO jurisprudence for the first time in 1991 with *Glessner v. Kenny*, 952 F.2d 702, 707-08 (3d Cir. 1991) and has since been adopted in *Grimmett v. Brown*, 75 F.3d 506 (9th Cir. 1996), *cert. granted* \_\_\_ U.S. \_\_\_, 135 L. Ed.2d \_\_\_, \_\_\_ S. Ct. \_\_\_ (1996), *cert. dismissed* \_\_\_ U.S. \_\_\_, 137 L. Ed.2d \_\_\_, \_\_\_ S. Ct. \_\_\_ (1997), and in *Klehr*. *Klehr* refused to consider the post-sale advertising frauds as contributing to cause separate injury “because they are all of the same type, flow from the same source, and are part of one cognizable pattern of conduct”. 87 F.3d at 239.

*Klehr*’s reasoning proves too much. Under *H.J., Inc. v. Northwestern Bell*, 492 U.S. 229, 106 L. Ed.2d 195, 109 S. Ct. 2893 (1989), plaintiff must plead that all of her injuries

resulted from a pattern of actions that are continuous and related. It is difficult to imagine injuries from any continuous and related pattern of racketeering that are not of the same type, flowing from the same source, and part of one cognizable pattern of conduct. *Klehr* would require a plaintiff, in order to meet the pattern requirements of *Northwestern Bell*, to plead herself out of an “independent injury” which may save her from the statute of limitations. The Eighth Circuit’s strict interpretation of “separate injuries” hearkens back to its insistence on “separate schemes” in order to state a RICO pattern, which this Court explicitly reversed in *Northwestern Bell*. Affirmance of the “new and separate injury” standard would move RICO interpretation backward, not forward.

*Klehr*’s strict interpretation of the “continuing damage” exception to accrual also suffers from the following infirmity. Under the Court of Appeals’ formula, once a plaintiff is aware of her RICO claim for four years and allows the statute of limitations to pass, the defendant then has a license to renew four-year old activity and commit racketeering acts with impunity, as long as the damage to plaintiff is not radically different from what she had suffered before. The original policy behind the statute of limitation, ensuring the repose of stale claims, would hardly be served by ensuring, with a guarantee of non-liability, the revival of old injurious acts. Therefore, this Court should correct the Court of Appeals’ overly narrow interpretation of the “new and independent injury” which would resume accrual of a RICO claim.

#### D. The Clayton Act Does Not Provide an Appropriate Accrual Model

*Agency Holding Corp. v. Malley-Duff Associates*, 483 U.S. 143, 97 L. Ed.2d 121, 107 S. Ct. 2759 (1987) adopted

from the Clayton Act a four-year statute of limitations for civil RICO claims. *Amici* do not dispute that the Clayton Act is the appropriate model for choosing the *length* of RICO's statute of limitations. However, key differences between the conduct proscribed by the two statutes, and the remedies available under them, undermine the Clayton Act's usefulness as a model for the *accrual* of a RICO action.

A claim accrues under the Clayton Act when a defendant commits an act that injures a plaintiff's business. *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 28 L. Ed.2d 77, 92, 91 S. Ct. 795 (1971). The Clayton Act treats multiple harmful acts by starting a new statute of limitations running at every act, but allowing plaintiff to recover only for acts and injuries occurring within four years of the complaint. *Id.*

This accrual rule does not take into account RICO's critical pattern element, which is absent from antitrust law. As *Zenith* demonstrates, each injurious act by an antitrust defendant creates a new and separate liability. However, a RICO plaintiff cannot make out a cause of action from one single injurious act. Since RICO requires plaintiff to plead a pattern, a concept which requires continuity, *H.J., Inc. v. Northwestern Bell*, 492 U.S. 229, 236, 106 L. Ed.2d 195, 206, 109 S. Ct. 2893 (1989), it should not import from the Clayton Act an accrual rule which is defined by discreteness.

Not every issue in civil RICO can be guided with a Clayton Act analog. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 87 L. Ed.2d 346, 105 S. Ct. 3275 (1985) reversed the Second Circuit's requirement of a "racketeering injury" which was derived directly from the Clayton Act's "antitrust injury". The more natural and workable model for accrual already exists

in criminal RICO prosecutions. While *Malley-Duff* recognized that the length of RICO's criminal statute of limitations was not the product of anything unique to RICO, 483 U.S. at 155-56, 97 L. Ed.2d at 133, the accrual of such a limitation is and should be based on RICO's unique qualities, including the presence of "[m]ultiple injuries, spread over time." The "last predicate act" rule adopted by the Third Circuit Court of Appeals most accurately reflects RICO's unique concepts, and should be adopted by this Court.

### CONCLUSION

For the reasons stated above, the judgment below should be reversed and remanded with directions that the question of accrual of Petitioners' RICO cause of action be addressed in light of the rule stated in *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988).

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Supreme Court of the U.S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1996

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**MARVIN KLEHR and MARY KLEHR**  
*Petitioners,*

v.

**A.O. SMITH CORPORATION and**  
**A.O. SMITH HARVESTORE PRODUCTS, INC.,**  
*Respondents.*

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**On Writ of Certiorari to the**  
**United States Court of Appeals for the Eighth Circuit**

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**BRIEF FOR THE AMERICAN COUNCIL OF LIFE**  
**INSURANCE AND AMERICAN HONDA MOTOR**  
**COMPANY, INC. AS AMICI CURIAE**  
**IN SUPPORT OF RESPONDENTS**

---

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PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (1995) . . . . .	8
CALVIN W. CORMAN, LIMITATION OF ACTIONS (1991) . . . . .	6, 11, 17
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## INTEREST OF THE *AMICI CURIAE*

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States. ACLI represents the interests of 577 member life insurance companies. Many of ACLI's members have been forced to defend themselves against spurious civil RICO lawsuits.

American Honda Motor Company, Inc. ("Honda") is the American distributor of Honda automobiles, motorcycles, all-terrain vehicles, and other motorized vehicles. Honda, like so many other legitimate businesses, has found itself subject to lawsuits seeking treble damages under RICO. In particular, it is currently defending numerous lawsuits brought by Honda dealers arising out of the convictions of several of Honda's executives for defrauding *Honda* by misusing their positions to obtain bribes from dealers in exchange for, *inter alia*, preferential treatment with respect to the award of new Honda dealerships. The plaintiffs in the cases against Honda have submitted an *amicus* brief arguing for the broadest possible accrual rule. Honda accordingly submits this brief to apprise the Court why such an approach is fundamentally misguided. In this brief, we neither respond to the factual allegations of the plaintiff-dealers nor provide a point-by-point reply to their legal arguments. This is, after all, not a case between Honda and its dealers. Instead, we provide an overall framework for the consideration of the accrual issue and respond to the key criticisms leveled by petitioners, their *amici*, and some of the lower courts against the "injury discovery" accrual rule and the Clayton Act accrual rule, which we endorse as being the most consistent with the Court's prior RICO decisions.<sup>1</sup>

## SUMMARY OF THE ARGUMENT

In *Agency Holding Corp. v. Malley-Duff Assocs., Inc.*, 483 U.S. 143 (1987), this Court held that the Clayton Act's

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<sup>1</sup> Counsel for the petitioners and counsel for the respondents have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court.

four-year statute of limitations applies to civil RICO claims. Because this Court already has determined that the Clayton Act is the appropriate source from which to borrow the statute of limitations for RICO, it is eminently logical to borrow the Clayton Act's accrual rule as well. Under the Clayton Act, a claim accrues and the statute of limitations begins to run when the putative plaintiff suffers an injury caused by the putative defendant's violation of the statute.

If, contrary to our arguments, the Court is not disposed toward borrowing the Clayton Act rule intact, we submit that the "injury discovery" rule appropriately balances the important federal interest in cutting off stale claims against the interest in adequately vindicating RICO's purposes. By contrast, both the "injury and pattern discovery" rule utilized by the court below and the "last predicate act" rule endorsed by petitioners and their *amici* give inadequate weight to the concerns underlying statutes of limitation. Moreover, they would represent pure judicial policy-making.

Finally, equitable tolling doctrines, such as fraudulent concealment, apply to civil RICO suits. Those doctrines, however, do not avail those plaintiffs who fail to exercise due diligence in identifying and pursuing their claims.

### ARGUMENT

Petitioners' brief, the brief of their *amici*, and many of the lower court decisions on this issue suffer from the same shortcoming: They ignore the import of this Court's decision in *Agency Holding Corp. v. Malley-Duff Assocs., Inc.*, 483 U.S. 143 (1987). Accordingly, in Part I of this brief, we show how this Court's decision in *Agency Holding* compels adoption of the Clayton Act accrual rule for civil RICO claims. We then turn in Parts II and III to explaining why, if some "discovery" requirement is to be superimposed, that requirement should be limited to the existence of the injury and should not extend to the existence of a "pattern of racketeering," which is the approach taken by the court

below, or to the existence of the "last predicate act" that is part of the pattern, which is the rule advanced by petitioners and their *amici*. Finally, in Part IV, we demonstrate that equitable principles do not toll the running of the statute of limitations for would-be plaintiffs who have not diligently investigated and pursued their claim.

### I. THIS COURT'S DECISION IN *AGENCY HOLDING* COMPELS THE ADOPTION OF THE CLAYTON ACT'S ACCRUAL RULE.

#### A. This Court Has Held That Congress Deliberately Used The Clayton Act As The Model For The Civil RICO Remedy.

In *Agency Holding*, this Court held that the Clayton Act's 4-year statute of limitations governs civil RICO claims. As this Court explained, "[e]ven a cursory comparison of the two statutes reveals that the civil action provision of RICO was patterned after the Clayton Act." 483 U.S. at 150. In particular, this Court noted the nearly identical phrasing of the two statutes and the common purpose to remedy the same type of injury, namely an injury "in [the plaintiff's] business or property" caused by the defendant's illegal conduct. *Id.* at 150-151.

Most importantly, this Court canvassed the legislative history of RICO and discovered that "[t]he close similarity of the two provisions [was] no accident." *Agency Holding*, 483 U.S. at 151. To the contrary, Congress expressly modelled the civil RICO remedy on the Clayton Act. Although the original version of the bill contained no civil remedy, the House Judiciary Committee adopted a proposal by Representative Steiger to add "a private treble-damages action 'similar to the private damage remedy found in the anti-trust laws.'" *Id.* at 152 (quoting *Hearings on S. 30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess., 520 (1970)). During the floor debate in the House of

Representatives, both the bill's sponsor and Representative Steiger compared the bill's civil remedy to that of the Clayton Act. See *Agency Holding*, 483 U.S. at 152 (citing 116 Cong. Rec. 27,739, 35,295 (1970)). The Senate then simply adopted the bill as amended in the House. See 116 Cong. Rec. 36,296 (1970). This history led this Court to conclude that it was "the clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act." *Agency Holding*, 483 U.S. at 152.

*Agency Holding* thus points the way to answering the question presented: The Clayton Act provides both the applicable statute of limitations *and* the accrual rule for civil RICO claims. The same reasons that led the Court to borrow the Clayton Act's statute of limitations equally compel adoption of that Act's accrual rule as well.

First, *Agency Holding* rests upon this Court's conclusion that Congress intended to model RICO's civil remedy upon that of the Clayton Act. See *Agency Holding*, 483 U.S. at 152; *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 368 (1991) (Stevens, J., dissenting) (noting that "in [*Agency Holding*], the Court found an explicit intent to pattern the RICO private remedy after the Clayton Act's private antitrust remedy"). Both the Clayton Act's statute of limitations and its accrual rule were well established when Congress enacted RICO.<sup>2</sup>

<sup>2</sup> Congress had amended the Clayton Act in 1955 to establish a uniform four-year limitations period. See Act of July 7, 1955, Pub. L. No. 84-137, 69 Stat. 283 (codified at 15 U.S.C. § 15b). As this Court recognized in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), the rule for determining when an antitrust claim *accrues* — whether under state limitations statutes or the 1955 uniform federal period — was an established component of antitrust law well before RICO was enacted in 1970. See, e.g., *Crummer Co. v. Du Pont*, 223 F.2d 238, 247-248 (5th Cir. 1955) (holding that antitrust claim accrues upon "doing of the first wrongful act with resulting damages"); *Foster & Kleiser Co.* (continued...)

Thus, just as this Court found it unthinkable that Congress intended a statute of limitations other than that of the Clayton Act to govern civil RICO suits, so too it is inconceivable that Congress intended some other accrual rule to apply to civil RICO claims. Absent evidence of some contrary legislative intent, for this Court to apply some other accrual rule drawn from a different area of law would be nothing less than judicial speculation in disregard of presumed congressional intent. Cf. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (noting that, when a common law principle is well-established at the time Congress acts, "the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident'" (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952))).

Second, this Court has recognized that a decision to "borrow" a statute of limitations does not license the Court selectively to pick-and-choose exactly which parts to "borrow." Addressing the appropriate statute of limitations for the implied right of action under SEC Rule 10b-5, this Court rejected the idea of borrowing one component of the 1934 Act's explicit one-year/three-year statute of limitations, while substituting for the other component a case-by-case

<sup>2</sup> (...continued)  
v. *Special Site Sign Co.*, 85 F.2d 742, 751 (9th Cir. 1936) ("The cause of action arises when the damage is sustained and the statute of limitations begins to run at that time."); *Bluefields S.S. Co. v. United Fruit Co.*, 243 F. 1, 20 (3d Cir. 1917) ("The statute began to run when the cause of action arose, and the cause of action arose when the damage occurred."), appeal dismissed, 248 U.S. 595 (1919); *Gaetzi v. Carling Brewing Co.*, 205 F. Supp. 615, 618 (E.D. Mich. 1962) ("The cases uniformly hold that a cause of action for damages under the antitrust laws does not arise with the formation of an illegal conspiracy, but rather when 'the plaintiff's interest is invaded to his damage.'" (quoting *Suckow Borax Mines Consol. v. Borax Consol.*, 185 F.2d 196, 208 (9th Cir. 1950))).



laches defense. *Lampf*, 501 U.S. at 362 n.8. The Court commented that "such a practice comes close to the type of judicial policymaking that our borrowing doctrine was intended to avoid." *Ibid*.

As with the two-pronged statute of limitations borrowed in *Lampf*, the Clayton Act's accrual rule is "indivisible" from the Clayton Act's statute of limitations. So too, cobbling together the Clayton Act's statute of limitations with some alien accrual rule would constitute "the type of judicial policymaking that [this Court's] borrowing doctrine was intended to avoid." *Lampf*, 501 U.S. at 362 n.8.

Third, the lower federal courts repeatedly have consulted antitrust law to resolve other statute-of-limitations-related issues in civil RICO suits. Several district courts have adopted the Clayton Act's accrual rule for civil RICO actions, see *Gilbert Family Partnership v. Nido Corp.*, 679 F. Supp. 679, 686 (E.D. Mich. 1988); *Armbrister v. Roland Int'l Corp.*, 667 F. Supp. 802, 824 (M.D. Fla. 1987),<sup>3</sup> and the leading academic commentator is in accord with this view. See 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 6.5.5, at 447-448 (1991) ("Presumably the accrual standards developed by the lower federal courts in 15 U.S.C. § 15b civil antitrust litigation should be equally applicable to civil enforcement RICO actions.").

Moreover, several circuits have applied the Clayton Act's "separate accrual" rule to civil RICO claims. See *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1103-1104 (2d Cir. 1988); *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring). The Second

<sup>3</sup> That no circuit has adopted the Clayton Act's accrual rule should give this Court no pause. In *Agency Holding*, this Court borrowed the Clayton Act's statute of limitations for civil RICO causes of action, even though no circuit had done so. See 483 U.S. at 149.

Circuit acknowledged civil RICO's legislative history and its similarity to the Clayton Act, concluding:

"In light of these similarities, we have little trouble in concluding that the same statute which lends its four-year limitation period to civil RICO actions should also lend its rule of accrual in determining when the four-year period begins to run." *Bankers Trust*, 859 F.2d at 1104.<sup>4</sup>

Even the petitioners rely upon antitrust law to argue for the "separate accrual" rule, though they inexplicably dismiss the underlying antitrust accrual rule itself. Compare Pet. Br. at 42 ("*Zenith's* 'separate accrual rule' creates a new RICO cause of action each time a plaintiff suffers an injury during the limitations period") with *id.* at 25 n.7 (rejecting Clayton Act accrual rule generally).

In short, having concluded that Congress chose to model the civil RICO remedy on the Clayton Act and having already held that the Clayton Act statute of limitations applies to civil RICO cases, this Court ought to take the logical next step and hold that the Clayton Act accrual rule governs in civil RICO cases as well.<sup>5</sup>

<sup>4</sup> Although purporting to borrow the Clayton Act's accrual rule, the Second Circuit in fact adopted an injury discovery rule that is distinct from the Clayton Act rule. See *Bankers Trust*, 859 F.2d at 1103, 1105.

<sup>5</sup> *Amicus* Forbes claims that the Clayton Act accrual rule does not adequately take into account RICO's "pattern" element. Forbes Am. Br. at 28. Such criticism ignores the fact that a RICO claimant does not recover for injuries caused by the "pattern" but rather for injuries caused by the predicate acts themselves. See *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497 (1985) ("Any recoverable damages occurring by reason of a violation of § 1962(c) [of RICO] will flow from the commission of the predicate acts.").

**B. Under The Clayton Act, The Cause Of Action Accrues And The Statute Of Limitations Begins To Run When The Plaintiff Is Injured By The Defendant's Illegal Conduct.**

This Court has defined the Clayton Act's accrual rule quite succinctly: "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith*, 401 U.S. at 338; 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 338b, at 145 (1995). Thus, as a general matter, the statute of limitations for treble-damages claims under the antitrust laws begins to run as soon as the anticompetitive conduct causes "injury", irrespective of the plaintiff's "knowledge" of any of the elements of the accrued claim. See, e.g., *Information Exch. Sys., Inc. v. First Bank Nat'l Ass'n*, 994 F.2d 478, 484 (8th Cir. 1993) (noting that, subject to an exception for fraudulent concealment, "[a] cause of action accrues under the antitrust laws when the defendant commits an act that injures the plaintiff's business").

While *some* civil RICO cases may be complex or difficult to discover, the typical civil RICO case surely involves acts no more complicated or secretive than the conduct concealed in a typical antitrust conspiracy case. Yet, as noted above, the Clayton Act's statute of limitations and its accompanying accrual rule have existed and worked well for decades. If the combination of a four-year limitations period with an accrual rule focused upon the time of the injury had worked a substantial hardship on antitrust plaintiffs or undermined the deterrent effect of the civil antitrust remedy, Congress surely would have changed one or the other.

In fact, the Clayton Act's limitations period and accrual rule are manifestly reasonable. To begin with, contrary to the assertions of petitioners and their *amici*, four years is not an unreasonably short time to "discover" the basis for bringing a lawsuit. Indeed, the four-year limitations period is longer than the limitation periods under many State

limitation statutes, which applied to antitrust actions before 1955, see S. Rep. No. 619, 84th Cong., 1st Sess. (1955), reprinted in 1955 U.S.C.C.A.N. 2328, 2332, and it is longer than the three-year period of repose Congress has established for securities fraud actions. *Lampf*, 501 U.S. at 362.<sup>6</sup> Moreover, as we now discuss, equitable tolling principles and the separate accrual rule are available, in appropriate cases, to mitigate any potential harshness in the Clayton Act's accrual rule.

**C. The "Separate Accrual" Rule As Applied Under The Clayton Act Would Mitigate Any Potential Harshness Associated With Adoption Of The Clayton Act's Accrual-Upon-Injury Rule.**

1. Applying the general Clayton Act accrual rule to civil RICO suits by individuals, each of whom was injured by a single predicate act that is part of the requisite pattern, is straight-forward: The claim accrues when the particular predicate act injures the plaintiff. So, for example, where an illegal scheme targets numerous victims but each victim is injured only by one predicate act in the pattern, each victim's claim accrues upon his or her injury.

In the context of multiple predicate acts causing injury to the same person or suits seeking recovery for future injuries, principles developed under the Clayton Act also guide the analysis for civil RICO claims. An example of the former situation is a scheme to extort or defraud a single victim involving multiple predicate acts, each of which may cause injury to that victim. An example of the latter situation is a

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<sup>6</sup> To put things in perspective, four years is the duration of an entire college education. Four years is the period that the Constitution fixes for the President to accomplish the objectives of that office. In four years, claimants will bring tens of thousands of civil suits in federal courts, including huge numbers of RICO claims. And, during a four-year period, this Court will decide 300 to 400 cases on the merits and fill 16 volumes of the U.S. Reports.



scheme to destroy the victim's business through various, roughly contemporaneous predicate acts, which though not initially successful, sufficiently weaken the business such that it fails five years later.

This Court has explained how the general Clayton Act accrual rule addresses similar situations that have arisen in the antitrust context. For example, in the context of continuing violations of the Sherman and Clayton Acts, the Court has concluded:

"In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, [the general rule] has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." *Zenith*, 401 U.S. at 338.

2. This application of the general Clayton Act accrual rule, however, has several, important limitations. First, "damages may not be recovered for injuries sustained as a result of acts committed outside the limitations period." *State Farm*, 828 F.2d at 5 (Kennedy, J., concurring). Second, illegal acts within the limitations period do not resurrect claims for prior injuries sustained *outside* the limitations period. *Johnson v. Nyack Hosp.*, 891 F. Supp. 155, 162 n.5 (S.D.N.Y. 1995), *aff'd*, 86 F.3d 8 (2d Cir. 1996). Third, to restart the statute of limitations for injuries caused by an overt act within the limitations period, the overt act must be "a new and independent act that is not merely a reaffirmation of a previous act" and it must "inflict new and accumulating injury." *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 238 (9th Cir. 1987); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992). Thus, claimants injured by continuing violations may recover treble damages only for those distinct injuries caused by acts within the four-year

limitations period. See *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1300-1301 (9th Cir. 1986).

Fourth, if future injuries of the same sort are highly probable and reasonably calculable, the limitations period begins to run at the time of the earliest injury. Thus, when that initial claim accrues, the plaintiff may recover "not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial." *Zenith*, 401 U.S. at 339. The plaintiff may recover these future damages only if the plaintiff commences the lawsuit within four years of the original injury; otherwise, recovery for these future damages is time-barred. Concomitantly, "future damages that might arise from the conduct sued on are unrecoverable [at the time of the original injury] if the fact of their accrual is speculative or their amount and nature unprovable." *Ibid.* In such instances, a cause of action as to those damages accrues, if at all, "only on the date they are suffered." *Ibid.*<sup>7</sup>

Thus, the "separate accrual" rule under the Clayton Act fairly and comprehensively addresses two distinct situations. One is the situation in which a single victim suffers multiple injuries caused by multiple violations, only some of which occurred during the limitations period. The other is the situation in which no wrongful act occurred within the limitations period but the victim suffered some injury within

<sup>7</sup> "[U]ncertain damages, which prevent recovery, are distinguishable from uncertain extent of damage, which does not prevent recovery. The former denotes failure to establish an injury, while the latter denotes imprecision with regard to the scope or extent of the injury. The question of whether there is a right to recovery is not to be confused with the difficulty in ascertaining the scope or extent of the injury." *Pace Indus.*, 813 F.2d at 240.

Consequently, this aspect of the Clayton Act accrual rule rarely delays accrual of the claim. See 1 CORMAN, *supra*, § 6.5.5.3, at 459-460.



the period that was not recoverable at the time of the earlier illegal act. The proper "separate accrual" rule for both antitrust and civil RICO claims combines both modifications in one rule. Thus, when a plaintiff suffers either a *new* and *independent* injury caused by a continuing series of illegal acts or a *future* injury that was speculative or unprovable at the time of the original injury, a cause of action accrues for that additional injury — but only for that separate and distinct injury — at the time it is suffered.

3. Although the petitioners and their *amici* endorse the "separate accrual" rule, they all contest the requirement that the subsequent injuries be "new" and "independent". See Pet. Br. at 43-44; NASCAT Am. Br. at 11-12; Forbes Am. Br. at 25. As noted above, the separate accrual rule in the antitrust or civil RICO context addresses two situations. The first is the continuing violation; the second involves suits seeking compensation for future damages that were speculative at the time of the original injury.

As to the former situation — where the plaintiff seeks to recover damages for injuries caused by a continuing series of illegal acts — the requirement that the injury be independent serves to ensure that the injuries claimed are, in fact, the product of the illegal act within the limitations period and not of a prior act committed outside the period. Compare *Bingham v. Zolt*, 66 F.3d 553, 561 (2d Cir. 1995) (holding separate accrual rule satisfied where "each illegal diversion constituted a new and independent legally cognizable injury"), cert. denied, 116 S.Ct. 1418 (1996) with *Grimmett v. Brown*, 75 F.3d 506, 514 (9th Cir. 1996) (holding separate accrual rule not satisfied where injuries were the same as those allegedly caused by previous acts committed outside limitations period), cert. dismissed as improvidently granted, 117 S.Ct. 759 (1997). Absent this requirement, there would be no way of guaranteeing that a plaintiff was recovering damages "resulting *only* from those acts committed less than four years before commencement of his suit." *Imperial Point*

*Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029, 1034 (5th Cir. 1977) (emphasis added).<sup>8</sup>

As to the other situation — where the injuries within the limitations period were too uncertain or speculative when the earlier injury occurred — the requirement that an injury be "separate and independent" of prior, time-barred injuries serves as a proxy for the speculativeness determination required by *Zenith*. See *Bingham*, 66 F.3d at 561 ("The speculative-versus-determinable language corresponds in practice to the underlying notion that a new and independent injury must occur to give rise to a separately-accruing civil RICO action under the rule of *Bankers Trust*.").

*Amicus* NASCAT claims that the "separate accrual" rule does permit victims to recover for subsequent, additional injuries that occur within the limitations period even if those injuries were caused by acts outside the limitations period. See NASCAT Am. Br. at 10. To support this amazing contention, NASCAT cites *Davis v. Grusemeyer*, 996 F.2d 617, 623 (3d Cir. 1993), which involves not the "separate accrual" rule but rather the Third Circuit's indefensible "last predicate act" rule.<sup>9</sup>

<sup>8</sup> The requirement does not, as petitioners and their *amicus* Forbes claim, put plaintiffs in the impossible position of demonstrating "relatedness" to satisfy the pattern requirement and "unrelatedness" to satisfy the separate accrual rule. Pet. Br. at 43; Forbes Am. Br. at 26-27. To satisfy the separate accrual rule, RICO plaintiffs need only show that the subsequent predicate act produced new *injuries* distinct from the injuries caused by earlier predicate acts outside the limitations period; the rule does not require that the *predicate acts* themselves be independent or unrelated.

<sup>9</sup> Even *Davis* does not support the broad contention advanced by NASCAT. That case rejected the RICO plaintiff's claim that he could recover for subsequent injuries suffered within the limitations period, noting that such injuries must constitute "a new and distinct injury from  
(continued...)"

As cases addressing the "separate accrual" rule and its antitrust precursors make clear, however, plaintiffs generally cannot recover for subsequent, related injuries occurring in the limitations period that were caused by acts outside the period. To the contrary, in *Zenith*, this Court held that injuries that were caused by acts outside the limitations period were time-barred, unless the plaintiff could demonstrate that the injuries were too speculative for the plaintiff to commence a lawsuit at the time of the original act. *Zenith*, 401 U.S. at 339. See *Long Island Lighting Co. v. Imo Indus. Inc.*, 6 F.3d 876 (2d Cir. 1993) (holding claim for injuries within limitations period was time-barred where injuries were not speculative at time of original injury). Similarly, courts applying the "separate accrual" rule in civil RICO suits adhere to the rule that, except for "late-developing injuries" that could not be proved in an earlier lawsuit, "[d]ifferent injuries flowing from the same conduct" do not trigger a new limitations period. *McCool*, 972 F.2d at 1465 n.10. Rather, "a new cause of action accrues only when there is a new instance of wrongful conduct and a new injury." *Ibid.*; see also *State Farm*, 828 F.2d at 5 (Kennedy, J., concurring).

In short, in borrowing the Clayton Act accrual rule, it also makes sense to borrow the "separate accrual" rule as articulated in *State Farm*, *McCool*, and *Bingham*. As in antitrust lawsuits, these modifications to the Clayton Act accrual rule would mitigate any potential harshness in applying the Clayton Act accrual rule in civil RICO cases when the claimant suffers separate and distinct but continuing injuries.

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<sup>9</sup> (...continued)

the initial injury.'" 996 F.2d at 627 (quoting *Glessner v. Kenny*, 952 F.2d 702, 708 (3d Cir. 1991)).

## II. IF SOME "DISCOVERY" REQUIREMENT IS TO BE SUPERIMPOSED IN RICO CASES, IT SHOULD APPLY ONLY TO THE EXISTENCE OF THE INJURY.

If, despite the foregoing arguments, the Court concludes that the Clayton Act accrual rule does not apply to civil RICO suits and that some discovery rule is warranted, we submit that the "injury discovery" rule adopted by a majority of the circuits is the appropriate one. In contrast to the "last predicate act" rule proposed by petitioners and the "injury-and-pattern discovery" rule adopted by the court below, the "injury discovery" rule appropriately balances the salutary purposes of statutes of limitations with the added deterrence ostensibly provided by private enforcement of RICO.

### A. Statutes Of Limitations Serve Critical Functions That Cannot Be Overlooked In Determining What Accrual Rule To Adopt.

"Statutes of limitation \* \* \* are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944).

Indeed, from the earliest days of the Republic to the present, this Court has held to the view that "[a] federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.'" *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (quoting *Adams v. Wood*, 2 Cranch 336, 342 (1805)). See also *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (noting that statutes of limitations "'are



found and approved in all systems of enlightened jurisprudence'") (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)).

Despite the claims of the petitioners and their *amici*, these principles apply with equal force to civil RICO claims. Indeed, this Court recognized the importance of the statute of limitations in civil RICO suits, observing that, without a statute of limitations, "[d]efendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose." *Agency Holding*, 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 275 n.34). A statute of limitations is not a mere obstacle to be brushed aside, as petitioners would have it, when "remedial" purposes require; rather, it should be regarded "as a 'meritorious defense, in itself serving a public interest'" *Kubrick*, 444 U.S. at 117 (quoting *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938)); see also *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452-453 (7th Cir. 1990) (Posner, J.) ("Statutes of limitation are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application.").

**B. In Those Areas Of Law Recognizing A Discovery-Based Accrual Rule, The Discovery Requirement Is Limited To The Injury Element.**

Given the importance of statutes of limitations and the purposes they serve, it was well settled at common law that, as a general rule, causes of action accrued and statutes of limitation began to run as soon as there was a "complete and present cause of action." *Rawlings v. Ray*, 312 U.S. 96, 98 (1941). See also 54 C.J.S. *Limitations of Actions* § 81, at 116 (1987) ("Unless a statute provides otherwise, the statute of limitations begins to run at the time when a complete cause or right of action accrues or arises, which occurs as soon as the right to institute and maintain a suit arises."). In other words, the *existence* of the elements of the cause of action,

not the plaintiff's *knowledge* of all or some of those elements, triggered the statute of limitations:

"Generally, mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations. Except where modified by statute, the rule is that the cause of action accrues when the act upon which the legal action is based took place and not when the damage became known. Difficulty in ascertaining the existence of a cause of action is irrelevant." *Id.* § 87, at 123 (footnotes omitted).

Beginning in the latter part of this century, some courts fashioned a "discovery" requirement as an exception to the general rule in narrow categories of cases. That "discovery" exception — which provides that the statute of limitations begins to run from the date the plaintiff discovered or reasonably should have discovered *the injury* — was developed in medical malpractice cases to address the problems of foreign objects left in patients' bodies during surgery and in occupational disease cases to address the problem of diseases with long latency periods. See 2 CORMAN, *supra*, §§ 11.1.2.1, 11.1.2.3; 54 C.J.S. *Limitations of Actions* § 87, at 124.

It is unclear whether the discovery rule has become the "general" or "presumptive" accrual rule.<sup>10</sup> Those decisions

<sup>10</sup> Some cases have stated broadly that, "[u]nder federal principles, a claim accrues when the plaintiff 'knows or has reason to know' of the injury that is the basis of the action," *Cullen v. Margiotta*, 811 F.2d 698, 725 (2d Cir. 1987) (quoting *Pauk v. Board of Trustees of City Univ.*, 654 F.2d 856, 859 (2d Cir. 1981)), or that the discovery rule applies "in the absence of a contrary directive from Congress." *Cada*, 920 F.2d at 450. In 1991, then-Judge Ruth Bader Ginsburg noted that a majority of the circuits agreed that the discovery rule is "the general accrual rule in federal courts." *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336,

(continued...)



adopting the rule, though, carefully limit its scope. For example, in *Kubrick*, this Court rejected the argument that a cause of action for medical malpractice under the Federal Tort Claims Act ("FTCA") accrued only when the plaintiff discovered that his injury was the result of medical malpractice. 444 U.S. at 123. The Court noted that a plaintiff who knows that he has suffered an injury has sufficient information to begin investigating the existence of a cause of action. See *id.* at 122-124.<sup>11</sup> To require that the plaintiff amass more information before triggering the statute

<sup>10</sup> (...continued)

342 (D.C. Cir. 1991). Judge Ginsburg recognized, however, that the antitrust accrual rule is an exception to this "injury discovery" approach. *Id.* at 342 n.10.

<sup>11</sup> The Court did not hold that it was *necessary* for the plaintiff to know who or what caused his injury, only that such information was *sufficient* to trigger the statute of limitations. See 444 U.S. at 120 ("[T]he Court of Appeals recognized that the general rule under the Act has been that a tort claim accrues at the time of the plaintiff's injury, although it thought that in *medical malpractice cases* the rule had come to be that the 2-year period did not begin to run until the plaintiff has discovered both his injury and its cause. But even so — and the United States was prepared to concede as much *for present purposes* — the latter rule would not save *Kubrick's* action since he was aware of these essential facts [more than two years before he filed suit].") (emphasis added).

Even if *Kubrick* could be understood to have left room to create an "injury and cause discovery" rule in medical malpractice cases under the FTCA, it would hardly support the "injury and *pattern* discovery" rule adopted by the Eighth Circuit. Quite simply, the cause of injury under RICO is the predicate act, not the pattern. *Sedima*, 473 U.S. at 497 ("Any recoverable damages occurring by reason of a violation of § 1962(c) [of RICO] will flow from the commission of the predicate acts."). Just as the Court refused to allow FTCA suits to be delayed until discovery that the injury resulted from a breach of the duty of care, there is no basis here for allowing delay of RICO suits until discovery that the act causing the plaintiff's injury was part of a "pattern".

of limitations "would undermine the purpose of the limitations statute." *Id.* at 123.

As *Kubrick* illustrates, the discovery principle, when it applies, extends only to the plaintiff's knowledge of his injury, not to his knowledge of other elements of his claim. Indeed, even *amicus* NASCAT acknowledges that fact elsewhere in its brief. See NASCAT Am. Br. at 22 ("Under the discovery rule, courts often find that the statute of limitations does not begin to run until the proposed plaintiff learns or should learn that he has been *injured*.") (emphasis in original).

There is no reason to go beyond this understanding of the discovery rule in civil RICO suits. The civil RICO plaintiff's injury provides sufficient information and incentive to begin investigating the injury and to commence any appropriate lawsuit. A more expansive discovery rule would permit plaintiffs to bring actions long after their injury, perhaps fourteen years afterward. Such a result cannot be squared with statutes of limitations in general or this Court's decision in *Agency Holding*. See *Rodriguez v. Banco Central*, 917 F.2d 664, 667 (1st Cir. 1990) (Breyer, C.J.). Thus, if any discovery requirement is appropriate, the civil RICO plaintiff's cause of action should accrue when the plaintiff discovers his injury or reasonably should have discovered it.

### C. Petitioners' And Their *Amici's* Criticism Of The "Injury Discovery" Rule And, By Implication, The Clayton Act Accrual Rule Is Misguided.

Petitioners, their *amici*, and some of the courts of appeals level one principal criticism against the "injury discovery" rule and, by implication, the Clayton Act accrual rule. They claim that the "injury discovery" rule could result in the statute of limitations running before a cause of action exists. See Pet. Br. at 32 n.10; NASCAT Am. Br. at 6-7; Forbes Am. Br. at 17; *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988). To illustrate, NASCAT

hypothesizes an imaginary plaintiff who is injured by one predicate act in 1990, which the plaintiff discovers in 1994, and by another predicate act, which the plaintiff does not discover until the year 2000. Evidently believing that the conclusion speaks for itself, NASCAT notes that the civil RICO statute of limitations for the first predicate act will have lapsed by the time the plaintiff discovers the pattern necessary to commence a civil RICO action. NASCAT Am. Br. at 7 & n.8. This argument is a red herring.

First, NASCAT assumes that there must be a RICO cause of action for the injury caused by the first predicate act. The RICO civil remedy, however, is only available to a person "injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c) (emphasis added). A lone predicate act, however, does not constitute a pattern of racketeering activity, see 18 U.S.C. § 1961(5) (requiring "at least two acts racketeering activity" within in 10 years of each other), and, therefore, does not constitute a violation of section 1962. See 18 U.S.C. § 1962 (requiring as an element of each offense "a pattern of racketeering activity"). In short, a person injured by a criminal offense, which subsequently turns out to be the first predicate act in a pattern of racketeering activity, has not been "injured \* \* \* by reason of a violation of section 1962," and no civil RICO claim exists. See *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985) (noting that plaintiff "can recover only to extent he has been injured in his business or property by the conduct constituting the violation"). The clear language of the statute compels this conclusion.

This understanding neither undermines deterrence nor undercompensates victims of RICO predicate acts. To begin with, the person injured by the first offense has full recourse to applicable state and federal causes of action, which permit full compensation, *plus* punitive damages in most states, *plus* double or treble damages if the defendant's conduct violated

a state deceptive trade practices statute. In addition, the victim of the subsequent acts establishing a RICO "pattern" — whether it be the same or a different person — is entitled to recover treble damages under RICO for any injuries caused by those acts. The prospect of substantial liability for both the first and subsequent acts should adequately deter defendants from engaging in a pattern of racketeering.

Second, even if the initial predicate act gave rise to a potential civil RICO claim, the fear that the "injury discovery" rule would foreclose civil RICO claims based upon later, undiscovered injuries to strangers would not warrant rejecting the rule. NASCAT's hypothetical plaintiff is a rare breed. As then-Chief Judge Breyer noted in reference to a similar hypothetical, "it seems unlikely that this type of example will arise very often." *Rodriguez*, 917 F.2d at 667. As such, adopting an accrual rule to conform to the tiny minority of cases would serve only to create a windfall for the plaintiffs in the vast majority of civil RICO cases. At most, NASCAT's hypothetical would justify adopting a suitable tolling rule for the extraordinary case, not a general rule of accrual for all cases. *Ibid.*; *McCool*, 972 F.2d at 1465.

### III. BOTH THE "INJURY AND PATTERN DISCOVERY" RULE AND THE "LAST PREDICATE ACT" RULE ARE UNSUITABLE.

#### A. The "Injury And Pattern Discovery" Rule Gives Inadequate Weight To The Strong Federal Interest In Barring Stale Claims.

As explained above, the "injury and pattern discovery" rule ignores the settled principle that the discovery rule, to the extent that it applies, extends only to the plaintiff's *injury*. There is no indication that Congress intended to depart from this principle, and, in the absence of such indication, this Court should refrain from expanding the discovery rule to cover the "pattern" element.



Moreover, the “injury and pattern discovery” rule threatens to postpone indefinitely the running of the statute of limitations. The concept of a “pattern” is a nebulous one, see *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 252 (1989) (Scalia, J., concurring in the judgment), and courts are sure to be hesitant in imputing knowledge of it to a plaintiff unschooled in the nuances of civil RICO jurisprudence. Indeed, precisely because of the vagaries involved in determining whether or not a pattern exists, an “injury and pattern discovery” rule will undermine “the federal interest \* \* \* in having ‘firmly defined, easily applied rules’” governing statutes of limitations. *Wilson*, 471 U.S. at 270 (quoting *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)).

**B. The Petitioners’ And Their *Amici*’s Policy-Laden Arguments In Favor Of The “Last Predicate Act” Rule Do Not Withstand Scrutiny.**

The “last predicate act” rule adopted by the Third Circuit and endorsed by petitioners and their *amici* is even more unbalanced than the “injury and pattern discovery” rule. This proposed rule lacks support in any other branch of civil jurisprudence. Nowhere else does a potential defendant’s commission of a wrongful act directed at a third person revive the long-lapsed claim of an unrelated plaintiff.

At bottom, the petitioners and their *amici* rest their argument for the open-ended “last predicate act” accrual rule upon hortatory blandishments about the need to further RICO’s deterrent purposes by permitting “private attorneys general” to enforce the Act. This rhetoric, of course, ignores the origin of the “private attorney general” — antitrust treble damage suits under the Clayton Act, for which claims accrue upon injury. This Court should see their arguments for what they are — a blatant attempt to substitute policy statements (statements more appropriately addressed to Congress than this Court) for legal arguments that come to grip with RICO’s text, its legislative history, and this Court’s decisions

interpreting the statute. Even on their own terms, however, their arguments do not warrant the adoption of the “last predicate act” rule.

1. The Petitioners and their *amici* defend the “last predicate act” rule by asserting that it is the accrual rule for criminal prosecutions under RICO. See Pet. Br. at 25-27; NASCAT Am. Br. at 20; Forbes Am. Br. at 7-9.<sup>12</sup> According to petitioners, the reasoning justifying the “last predicate act” rule for criminal prosecutions “applies with equal force to civil RICO.” Pet. Br. at 27. Petitioners could not be further from the truth.

First, in *Agency Holding*, this Court expressly rejected the contention that the statute of limitations for criminal prosecutions under RICO should govern civil suits. 483 U.S. at 156. It would be incongruent, to say the least, to adopt for civil RICO suits an accrual rule drawn from the criminal context after having refused to borrow the criminal statute of limitations as inappropriate.

Second, the criminal accrual rule does not mesh with the civil RICO remedy. A criminal RICO count charges the

<sup>12</sup> Although one would never know it from reading the briefs of petitioners’ or their *amicus* Forbes, the “last predicate act” rule is not *the* accrual rule for criminal RICO prosecutions. To the contrary, the date that a criminal RICO prosecution “accrues” depends upon the exact section of the act that is the basis for the prosecution. Although the statute of limitations for prosecutions for violations of section 1962(c) runs from the date of the last predicate act committed by the defendant, see *United States v. Bethea*, 672 F.2d 407, 419 (5th Cir. Unit B. 1982), the statute of limitations for violations of section 1962(d), which criminalizes RICO conspiracies, begins to run when the purposes of the conspiracy are accomplished or abandoned, regardless of when the predicate acts, if any, were committed. *United States v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987). Moreover, the statute of limitations for violations of section 1962(a) begins to run when the defendant uses or invests the income derived from a pattern of racketeering activity. See *United States v. Vogt*, 910 F.2d 1184, 1195-97 (4th Cir. 1990).



defendant with violating RICO by a course of conduct. "The triggering event under subsection (c) may therefore rightly be identified as the last predicate act making up the pattern of racketeering activity because that also marks consummation of the conduct proscribed." *United States v. Vogt*, 910 F.2d 1184, 1196 (4th Cir. 1990). A civil RICO claim, by contrast, seeks to recover damages caused by the predicate acts, not the RICO offense itself. See *Sedima*, 473 U.S. at 497 (noting that "[a]ny recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts"). For this reason, a civil claimant's allegation of a RICO conspiracy does not affect the limitations period, since any actionable "injury" flows from commission of the specific predicate crime impacting the plaintiff. See *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546, 1550 n.7 (11th Cir. 1990); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984). Consequently, the "last predicate act" approach, which is well suited in the criminal context where the Government prosecutes defendants for the course of conduct as a whole, is ill-suited for the civil context where the plaintiff seeks to recover treble damages only for injuries caused by a predicate act.

Third, analogizing to the criminal RICO context actually undermines any argument for adopting the "last predicate act" approach to civil RICO suits. Significantly, the commission of a predicate act within the limitations period only permits a prosecution for the RICO offense as a whole; it does not resurrect time-barred prosecutions for earlier predicate acts committed outside the relevant limitations periods. See *United States v. Boffa*, 513 F. Supp. 444, 479 (D. Del. 1980) (noting that Government could not prosecute criminal conduct occurring more than five years before indictment but could charge such conduct as predicate acts of RICO offense); *United States v. Castellano*, 610 F. Supp. 1359, 1381-1384 (S.D.N.Y. 1985) (dismissing as time-barred counts charging

conduct over five years old at time of indictment but rejecting claim that those counts could not serve as predicate acts for RICO count). Indeed, to permit plaintiffs to recover civil damages for injuries caused by predicate acts committed outside the limitations period would place the civil plaintiff in a *better* position than the Government, which cannot prosecute the defendant for those offenses.<sup>13</sup>

2. Petitioners' *amici* argue that any proposed accrual rule must be "reconciled" with 18 U.S.C. § 1961(5), which defines a "pattern of racketeering activity" to include at least two predicate acts committed within ten years of each other. NASCAT Am. Br. at 18. Quoting from the Third Circuit's opinion in *Keystone*, both NASCAT and Forbes claim that the ten-year limit reflects Congress' intent to permit suits for damages caused by predicate acts committed more than four years before the suit was commenced. *Ibid.*; Forbes Am. Br. at 12-13.

The short answer is that the definition of pattern does not indicate that Congress envisioned, much less intended to license, civil suits seeking damages for predicate acts outside the limitations period. Congress crafted the "pattern" concept while the RICO bill was exclusively a criminal measure; the later decision to engraft a private civil remedy cannot be understood as revolutionizing established statute-of-limitations principles. Indeed, *amici*'s goal — to legitimate civil suits filed within four years of the last predicate act but seeking damages for predicate acts committed as much as fourteen years earlier — directly contradicts this Court's decision in *Agency Holding* that civil RICO suits be subject to a four-year

<sup>13</sup> Like the Government in a criminal prosecution, civil RICO plaintiffs injured by subsequent predicate acts may introduce evidence of earlier, time-barred acts to establish a "pattern" of racketeering activity. Cf. *United States v. Walsh*, 700 F.2d 846, 852 (2d Cir. 1983).

statute of limitations. See also *Rodriguez*, 917 F.2d at 667 (Breyer, C.J.).<sup>14</sup>

3. Finally, the by-now tired refrain that RICO is to be "liberally construed" to accomplish the Act's remedial and deterrent purposes is not an open invitation to accept whatever argument a RICO plaintiff is currently proffering. See *Forbes Am. Br.* at 9. Indeed, that bromide did not prevent the Court from interpreting RICO to embody a rigorous proximate-cause requirement. See *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-274 (1992). It did not prevent the Court from holding that the defendant must have participated in the management or operation of the enterprise to be subject to RICO liability. See *Reves v. Ernst & Young*, 507 U.S. 170, 183-184 (1993). It did not prevent the Court from rejecting broad interpretations of the "pattern" requirement. See *H.J. Inc.*, 492 U.S. at 236, 243 n.4 (rejecting notions that "a pattern is established merely by proving two predicate acts" and that RICO applies to short periods of criminal activity that are unlikely to recur in the future). And, most importantly, it did not prevent the Court from borrowing the Clayton Act's statute of limitations. See *Agency Holding*, 483 U.S. at 155-156 (rejecting use of the longer statute of limitations for criminal RICO violations). Whatever practical value lies in that interpretive directive, it does not justify renouncing long-settled principles underlying statutes of limitations to create an accrual rule that licenses lawsuits long after the illegal act has occurred and witnesses' memories have begun to fade.

<sup>14</sup> If a RICO "pattern" may last longer than ten years, the "last predicate act" approach could theoretically keep a particular civil claim alive virtually forever. See *Rodriguez*, 917 F.2d at 667 (Breyer, C.J.).

#### IV. EQUITABLE PRINCIPLES DO NOT TOLL THE STATUTE OF LIMITATIONS WHEN A PLAINTIFF DOES NOT EXERCISE REASONABLE DILIGENCE IN DISCOVERING THE CLAIM.

There is no doubt that some equitable tolling principles apply to the Clayton Act's statute of limitations. See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 558-559 & n.29 (1974); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 338 n.\* (1978) (Burger, C.J., concurring). In *American Pipe*, the Court suggested that the four-year statute may be tolled "because of inducement by the defendant" not to sue within the period or "because of fraudulent concealment." 414 U.S. at 559. Since *Agency Holding* applied the Clayton Act's statute of limitations to civil RICO suits, it follows that these equitable tolling principles should apply to civil RICO suits as well. Indeed, several courts have concluded that "standard" tolling principles apply in civil RICO suits. See, e.g., *Rodriguez*, 917 F.2d at 667-668; *Bankers Trust Co.*, 859 F.2d at 1105.

All equitable tolling doctrines, however, contain the due diligence requirement that the court below found petitioners had failed to satisfy. The requirement that the plaintiff exercise reasonable diligence in discovering the claim is built into the definition of "equitable tolling." In addition to showing that the defendant took steps to conceal the fraud or other illegal act, a plaintiff seeking equitable tolling must also prove that he did not and could not "with due diligence" obtain essential information for commencing a suit. *Holmberg v. Armbrucht*, 327 U.S. 392, 397 (1946) (noting that "where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered'" (quoting *Bailey v. Glover*, 88 U.S. 342, 348 (1874) (emphasis added))). Indeed, even the petitioners and *amicus* NASCAT concede as much. See *Pet. Br.* at 45; *NASCAT Am. Br.* at 24-25.



The crux of the dispute in this case centers upon whether the branch of equitable tolling sometimes called "equitable estoppel" or "fraudulent concealment" is available to a plaintiff who fails to exercise due diligence when confronted with affirmative acts by the defendant intended to gull the prospective claimant. This Court, however, has repeatedly observed that the plaintiff has a duty of diligent inquiry even if the defendant actively conceals his wrongdoing. For example, over 120 years ago, this Court stated:

"[W]hen there has been *no negligence or laches on the part of a plaintiff* in coming to the knowledge of the fraud which is the foundation of the suit, *and when the fraud has been concealed*, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349-350 (1874) (emphasis added).

See also *Wood v. Carpenter*, 101 U.S. 135, 143 (1879); *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."). Indeed, in defining the "fraudulent inducement" branch of equitable estoppel, this Court has insisted that the plaintiff seeking to avoid the limitations bar must prove that he "was *justifiably misled into a good-faith belief*" that he need not bring suit. *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 235 (1959) (emphasis added).

Petitioners conveniently ignore these decisions, preferring instead to contest the wisdom of such a policy. Specifically, they contend that imposing a duty to exercise reasonable diligence confuses the "discovery" rule with "fraudulent concealment." Pet. Br. at 46. Relatedly, they claim that such a duty fails to punish a defendant for acts of concealment and requires the plaintiff to discover not only the cause of action but also the concealment itself. *Id.* at 46-47.

These criticisms miss the mark. Requiring the plaintiff to act diligently does not fail to "punish" the defendant for the fraudulent concealment. To the contrary, the defendant still loses the benefit of the statute of limitations until a plaintiff acting diligently under all the circumstances, which include the act of concealment, would discover the claim.

Nor is there any overlap between the applicable accrual rule and the "fraudulent concealment" doctrine. As explained above, the antitrust accrual rule, which should apply to civil RICO suits, does not require any discovery. If the applicable accrual rule includes some discovery element, however, it does not follow that this Court should drop the due diligence duty from the "fraudulent concealment" doctrine. To the contrary, that doctrine is inapplicable in situations where the "discovery" rule applies. As discussed above, courts have departed from the common law accrual rule and adopted the "discovery" rule to respond to situations in which the plaintiff, *despite his own diligence*, could not reasonably be expected to know of his injury. Not surprisingly, this same concern was the original justification prompting equity courts to estop defendants from pleading the statute of limitations in cases of fraudulent concealment, see *Wood*, 101 U.S. at 139, and it continues to underlie the doctrine today. In short, the "discovery" rule has supplanted the need for the "fraudulent concealment" doctrine. Although dropping the requirement that a plaintiff exercise reasonable diligence would certainly differentiate the "fraudulent concealment" doctrine from the "discovery" rule, it is not a good reason for changing one sound rule that another rule now supersedes it in some cases.

At bottom, petitioners propose a tolling rule that equally benefits the indolent as well as the diligent — a stunning proposition for a rule derived from equity. Indeed, because those who act diligently already are fully protected, only the unreasonably inattentive stand to gain from the adoption of petitioners' proposed rule. As the Sixth Circuit pointedly commented in rejecting the same arguments:



"[The plaintiff] would have the statute tolled indefinitely, while evidence stales, memories fade and courts and adversaries wait, until the plaintiff at his leisure alleges actual discovery, despite the avalanche of evidence that would put all but the most indiligent plaintiffs on notice of a cause of action."

*Campbell v. Upjohn Co.*, 676 F.2d 1122, 1128 (6th Cir. 1982).

Noting the salutary purposes served by statutes of limitation, the Sixth Circuit concluded that "[a] plaintiff who requests the avoidance of these important objectives owes the courts, the public and his adversaries a duty of diligence in discovering and filing his lawsuit." *Ibid.*

### CONCLUSION

All of petitioners' arguments share one purpose: to eviscerate the civil RICO statute of limitation as a practical matter. This Court in *Agency Holding*, however, rejected the suggestion that civil RICO suits were subject to no limitations period. 483 U.S. at 156. This Court should not now welcome through the backdoor a rule of law that it refused at the front.

Respectfully submitted.

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OCTOBER TERM, 1996

MARVIN KLEHR and MARY KLEHR,

*Petitioners,*

—v.—

A.O. SMITH CORPORATION and  
A.O. SMITH HARVESTORE PRODUCTS, INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF THE NATIONAL HOCKEY LEAGUE  
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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BRIEF OF THE NATIONAL HOCKEY LEAGUE  
AS *AMICUS CURIAE* IN SUPPORT OF  
RESPONDENTS

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This brief in support of respondents is submitted in accordance with Rule 37 of the Rules of this Court. The National Hockey League ("NHL") has obtained and filed herewith the written consent of the petitioners and respondents to the submission of this brief.

## INTEREST OF AMICUS CURIAE

The NHL and 22 of its member clubs are defendants in a civil RICO action captioned *Forbes v. Eagleson*, Civil Action No. 95-7021, pending in the United States District Court for the Eastern District of Pennsylvania. The named plaintiffs in that action, David S. Forbes, *et al.*, along with another group of RICO plaintiffs,<sup>1</sup> have submitted an *amicus curiae* brief in support of petitioners.<sup>2</sup>

The NHL joins in the arguments made by respondents and the other *amici* urging affirmance, and submits this brief chiefly to present the Court with a concrete example of the abuses inherent in any expansive RICO statute of limitations accrual rule, particularly the Third Circuit's "last predicate act" approach advocated by petitioners and their *amici*. What this aberrant rule has done is to allow a group of plaintiffs who – for six, if not eleven, years prior to filing their RICO complaint – knew all the material facts underlying their claim of injury, and all the material facts relating to their allegations of a pattern of racketeering activity, to survive a motion to dismiss on statute of limitations grounds.

<sup>1</sup> Plaintiffs' Executive Committee in *In re American Honda Motor Co., Inc. Dealerships Relations Litigation*, MDL No. 1069 (D. Md.).

<sup>2</sup> A motion to allow that *amicus* brief to be filed late was submitted to this Court on March 5, 1997.

## ARGUMENT

### Introduction

While it has been conclusively established by this Court that the statute of limitations for civil RICO claims is four years, *see Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987), the Circuits have divided as to when a civil RICO claim accrues and the statute begins to run. The Third Circuit, one of the first to address the accrual issue in the wake of *Agency Holding*, determined that a civil RICO claim accrues on:

the date the plaintiff knew or should have known that the elements of a civil RICO cause of action existed, unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern. In that case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same "pattern."

*Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1126 (3d Cir. 1988).

None of the other Circuits have followed the *Keystone* accrual rule. The Third Circuit stands alone (*see* 2a) in allowing the statute of limitations to be extended simply because of the alleged commission of further predicate acts in the same pattern, even if those predicate



acts have not caused any injury whatsoever to the plaintiff.

*Rejection of the "Last Predicate Act" Rule*

The First, Second, Fourth, Fifth, Seventh, Ninth and District of Columbia Circuits have embraced what has become known as the "injury discovery" rule, under which a civil RICO claim accrues when the plaintiff discovered or should have discovered the injury; any subsequent injury gives rise to a *new* claim, but does not extend the limitations period for the earlier injury. See *Rodriguez v. Banco Central*, 917 F.2d 664, 665-68 (1st Cir. 1990) (Breyer, C.J.); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-66 (7th Cir. 1992); *Grimmett v. Brown*, 75 F.3d 506 (9th Cir.), *cert. dismissed*, 117 S. Ct. 759 (1997); *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988); *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-90 (D.C. Cir. 1989); see also *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987) (same, but without separate accrual rule for each injury).

The Eighth Circuit in the decision below, together with the Sixth, Tenth and Eleventh Circuits, have adopted an alternative accrual rule, known as the "injury and pattern discovery" rule, pursuant to which a civil RICO claim accrues when the plaintiff discovers, or reasonably should have discovered, the existence and source of the injury and that the injury is part of a pattern. See *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233 (6th Cir. 1992); *Klehr v. A.O. Smith Corp.*, 87 F.3d 231 (8th Cir. 1996), *cert.*

*granted*, 117 S. Ct. 725 (1997); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 153-54 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990), *overruled in part on other grounds sub nom. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Fla. Inc.*, 906 F.2d 1546, 1550-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991).

*Judicial Criticism of Keystone*

The Third Circuit's unique rule has been expressly criticized by a number of circuits. In the First Circuit's decision in *Rodriguez v. Banco Central*, 917 F.2d at 667, then-Chief Judge Breyer rejected the *Keystone* approach because of the extended period of time that it provides for plaintiffs to file suit:

[i]f the "pattern" took the form of one related act, say, every two years (so that each act "occurred within ten years . . . after a prior act"), say for thirty or forty years, the Third Circuit's test, literally interpreted, would permit the plaintiff (injured in 1980) to bring suit thirty-four or forty-four years later.

Likewise, the Seventh Circuit has criticized the *Keystone* rule's potential effect of permitting a further act to sweep otherwise time-barred prior acts into the limitations period even when the further act did not injure the plaintiffs:

while more recent acts in a normal continuing violation will involve harm to the plaintiff, a RICO plaintiff [under the *Keystone* rule]

*could bring suit based on recent predicate acts that harmed others, or no one.*

*McCool v. Strata Oil Co.*, 972 F.2d at 1466 (emphasis supplied).

The pernicious effects of the *Keystone* rule, and then-Chief Judge Breyer's prediction in *Rodriguez* that *Keystone* "would permit the plaintiff . . . to bring suit thirty-four . . . years later," can perhaps best be illustrated by an all-too-real example: how one set of plaintiffs were able to sit on their rights for several years – with full knowledge of all the facts underlying their RICO claims – and survive a motion to dismiss on statute of limitations grounds solely because they chose to bring suit in the Third Circuit.

*Forbes v. Eagleson*

For many years, professional hockey players, their agents and members of the news media charged that R. Alan Eagleson abused his position as Executive Director of the National Hockey League Players' Association (the "NHLPA"). These detractors complained that Mr. Eagleson was excessively friendly with management, had numerous conflicts of interest and seemed to be far more interested in various schemes to enrich himself personally than he was in representing his constituency.

As early as July 2, 1984, a *Sports Illustrated* article entitled "The Man Who Rules Hockey" described in great detail Mr. Eagleson's asserted "conflicting roles" and the benefits he purportedly obtained for himself as a "friend of management." The article accused Mr. Eagleson of diverting funds from international hockey tournaments and improperly profiting from his control over the

placement of player disability insurance coverage. It listed the various individuals and companies through whom Mr. Eagleson allegedly channeled his international hockey ventures (including many of the defendants named in the *Forbes* complaint), and repeatedly suggested that Mr. Eagleson was profiting from each of these various enterprises.

The widespread belief among NHL players that Mr. Eagleson had for many years engaged in extensive misconduct to the detriment of the union caused the players to commission attorney Edward Garvey to conduct a thorough evaluation of Mr. Eagleson's activities. In the summer of 1989, more than 6-1/2 years prior to the initiation of the *Forbes* action, Mr. Garvey issued a lengthy and detailed report that echoed and expanded upon the allegations of the *Sports Illustrated* article and set forth at length and with considerable specificity all the essential elements of the *Forbes* complaint.

The essence of the Garvey Report was that Mr. Eagleson was controlled by the NHL, which in turn obtained everything it wanted in its labor negotiations with the union. Mr. Garvey advised the players that Mr. Eagleson's loyalty had in effect been purchased by the NHL in exchange for the revenues from international hockey tournaments that Mr. Eagleson managed. The Garvey Report revisited each major event in the union's history, alleging at every step along the way that the NHL, with Mr. Eagleson's connivance, had artificially depressed player compensation and benefits. Mr. Garvey concluded that the NHL "won" every negotiation with the union because of its alleged "deal" with Mr. Eagleson.

Over six years later, a group of lawyers – including Mr. Garvey – recast these criticisms of Mr. Eagleson



into a RICO action captioned *Forbes v. Eagleson*, Civil Action No. 95-7021 (E.D. Pa.). The *Forbes* plaintiffs boasted that they chose to bring their case in Pennsylvania, a forum that bears virtually no relationship to the facts of the dispute, to take advantage of the *Keystone* rule and withstand a statute of limitations defense.

Echoing the statements in the *Sports Illustrated* article and the Garvey Report, the *Forbes* plaintiffs contend that, with respect to the four collective bargaining agreements negotiated between 1972 and 1991, when Mr. Eagleson's contract as Executive Director expired, a different and more beneficial agreement would have been reached had Mr. Eagleson not been given control of international hockey tournaments and disability insurance. According to the *Forbes* complaint, had Mr. Eagleson been a more vigorous bargainer, hockey players would have secured higher salaries and other benefits from their respective employer clubs.

Citing *Keystone* and noting that it was "bound by this Circuit's *unique* accrual rule" (2a<sup>3</sup>; emphasis supplied), the district court denied the NHL's motion to dismiss the complaint. Although the allegations of the Garvey Report reverberate in the *Forbes* complaint, and the *Forbes* plaintiffs knew of their injury more than six years before the complaint was filed, the complaint was sustained under the "last predicate act" rule, with the predicate acts in question having nothing whatsoever to do with any of plaintiffs' purported injuries.

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<sup>3</sup> For the Court's convenience, the district court's opinion in *Forbes v. Eagleson* is reproduced in full as an appendix to this brief.

*Forbes* also illustrates the dangers of allowing the "last predicate" act to determine the point at which a civil RICO claim accrues; application of the *Keystone* principle demonstrates that in certain circumstances, the statute of limitations may not begin to run for years after the core racketeering activity has ceased and the enterprise has disbanded.

The *Forbes* plaintiffs attempted to enliven their claim by alleging that predicate acts occurred within four years of the filing of their complaint. Even though the alleged giving of "control" to Mr. Eagleson over international hockey was alleged to have occurred years earlier, the *Forbes* plaintiffs contended that whenever Mr. Eagleson received proceeds from the international tournaments the NHL committed a new and distinct predicate act.<sup>4</sup> The district court accepted this proposition, on constraint of *Keystone*, concluding "that the transfers of tournament revenues to Eagleson throughout 1991 constitute further acts" extending the statute of limitations. (5a)<sup>5</sup>

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<sup>4</sup> Indeed, in their *amicus curiae* brief in this case (at 3), the *Forbes* plaintiffs suggest that the alleged wrongful conduct on the part of the NHL continues "to the present," presumably, in their view, postponing the accrual of their RICO claim indefinitely.

<sup>5</sup> In so doing, the district court declined to follow a line of cases holding that mere use of a previously conferred benefit (or, alternatively, the continued profiting from a wrongful act) is insufficient to create a string of new, separate predicate acts. See *Management Computer Servs. v. Hawkins, Ash, Baptie & Co.*, 883 F.2d 48, 50 (7th Cir. 1989); *R.E. Davis*



### Conclusion

On any level, allowing plaintiffs to bring suit many years after they became aware of all of the facts underlying their claims is antithetical to the concept and purpose of statute of limitations. As this Court stated in *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted), "[s]tatutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" The "last predicate act" rule, which only the Third Circuit endorses, allows stale claims to moulder and still fall within the statute of limitations.

We respectfully submit that public policy favors a rule that provides a measure of certainty to those who would sue or be sued in a civil RICO action, not one that allows claims to linger in perpetuity for so long as the effects of an abandoned racketeering enterprise continue to be felt.

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*Chem. Corp. v. Nalco Chem. Co.*, 757 F. Supp. 1499, 1520 (N.D. Ill. 1990); *see also Dynabest, Inc. v. Yao*, 760 F. Supp. 704, 708 (N.D. Ill. 1991).

### CONCLUSION

For the foregoing reasons, *amicus curiae* National Hockey League respectfully submits that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: March 20, 1997

## APPENDIX

**APPENDIX**

DAVID S. FORBES ET AL.

V.

R. ALAN EAGLESON ET AL.

CIVIL ACTION NO. 95-7021.

UNITED STATES DISTRICT COURT,  
EASTERN DISTRICT OF PENNSYLVANIA.

JULY 22, 1996,

AMENDED JULY 23, 1996.

MEMORANDUM AND ORDER

O'NEILL, J.

Defendants have moved to dismiss the Complaint or to transfer or stay the action. I will decide these motions on the pleadings<sup>1</sup> and thus must accept the well-pleaded factual allegations as true, construe them favorably to plaintiffs, and determine whether "under any reasonable reading of the pleadings, the plaintiff[s] may be entitled to relief." *Colburn v. Upper Darby Township*, 838 F.2d 663, 664-65 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989). Dismissal is proper at this stage only if no relief could be granted under any set of facts that could be proven. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

I. Statute of Limitations

Defendants assert that the Complaint, which was filed November 7, 1995, is time-barred under the

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<sup>1</sup> Because materials submitted outside the pleadings raise disputed issues of fact and admissibility I confine my inquiry to the pleadings and reserve consideration of the additional matter until further factual development.



four-year limitations period that governs civil RICO actions. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). A claim accrues when:

plaintiff knew or should have known that the elements of a civil RICO cause of action existed, unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern. In that case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same racketeering activity.

*Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1126 (3d Cir. 1988) (emphasis added); *accord Arab African Int'l Bank v. Epstein*, 10 F.3d 168, 174 (3d Cir. 1993).<sup>2</sup>

Plaintiffs allege an ongoing scheme between their former labor representative Alan Eagleson and the National Hockey League<sup>3</sup> whereby Eagleson, as director of the NHL Players' Association, "cooperated with the NHL ... to maintain a company dominated union to the detriment of the players and to the benefit of the NHL." Complaint at ¶ 58(l).

The NHL allegedly induced Eagleson's cooperation by: (1) entering international hockey tournament joint ventures with Eagleson and the NHLPA; (2) assuring the

<sup>2</sup> I am bound by this Circuit's unique accrual rule.

<sup>3</sup> References to the NHL include all NHL-affiliated defendants.

tournaments' profitability by allowing players otherwise forbidden to compete outside the NHL to participate; and (3) affording Eagleson "substantial personal profit" by giving him "unsupervised control" of the tournaments and "deliberately and repeatedly fail[ing] to hold him accountable for [tournament] proceeds" belonging to the NHL and NHLPA. ¶¶ 2-3, 36-38. In return for diverting its share of tournament profits to Eagleson the NHL obtained "control and influence" over him which allowed it to elicit concessions in collective bargaining, player salaries and other players' rights, generating "substantial ... additional profits" for the NHL due to the "players' artificially low earnings." ¶¶ 3-4, 57.

Plaintiffs allege that this scheme of knowing or deliberate failures to hold Eagleson accountable for tournament revenues continued until Eagleson relinquished his role as NHLPA Executive Director on December 31, 1991 because Eagleson continued to receive and appropriate NHL and NHLPA tournament profits throughout that time. ¶¶ 3, 41, 43-46, 56. I must decide whether these wrongful receipts of NHL and NHLPA funds in late 1991 can constitute predicate acts within the alleged pattern of racketeering activity.

#### A. Predicate Acts

The Labor Management Relations Act forbids employers to deliver "any money or other thing of value" to labor representatives and forbids labor representatives to receive the same. 29 U.S.C. § 186(a)-(b). Violations of § 186 constitute predicate acts of racketeering under RICO. 18 U.S.C. § 1961(1)(C). Plaintiffs assert that: (1) "[e]ach receipt of [tournament] funds by Eagleson was a separate bribe under Section 186, and a separate predicate act;" and (2) these transfers of NHL funds to Eagleson

through international hockey ventures continued throughout 1991. Mem. at 16; Complaint at ¶¶ 41, 44-46, 56, 81.

It is well established that each delivery or receipt of a "thing of value" can constitute a separate § 186 violation and a separate RICO predicate act, even when the payment is part of one continuous, previously devised bribery scheme. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir. 1994), *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 900 (1995); *United States v. Boffa*, 688 F.2d 919, 934 (3d Cir. 1982).

Defendants, however, characterize Eagleson's ongoing receipt of tournament profits throughout 1991 as "mere use of a previously conferred benefit" or "continued profiting from a wrongful act," Reply Mem. at 7. Such further use of or profit from a previously obtained item would not constitute a further predicate act. *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 883 F.2d 48, 51 (7th Cir. 1989) (later sale of misappropriated software); *Dynabest, Inc. v. Yao*, 760 F. Supp. 704, 709 n.3 (N.D. Ill. 1991) (later use of wrongfully obtained customer list); *R.E. Davis Chem. Corp. v. Nalco Chem. Co.*, 757 F. Supp. 1499, 1520 (N.D. Ill. 1990) (later use of wrongfully obtained chemical formula).

The instant Complaint does not, however, allege that Eagleson received one thing of value—control over international hockey—and then merely used it in otherwise lawful ways. The predicate acts it alleges are thus not analogous to lawful transactions like the sale of software in Management Computer that are tainted only by the use therein of previously misappropriated items. Rather, the further transfers of value alleged in this case,

which themselves violate § 186, are more closely analogous to the later use of misappropriated software to make further unlawful acquisitions. Where, as here, the later acquisitions in themselves violate the law regardless of the assets used to facilitate them, Management Computer is distinguishable. I thus find Management Computer and its progeny inapposite and conclude that the transfers of tournament revenues to Eagleson throughout 1991 constitute further acts and not mere continuing uses of or profits from a prior wrong. Defendants further argue that in contrast to Cox and Boffa, which involved "affirmative acts by an employer," the continuing transfers of value alleged in this case constitute a mere "failure to ... prevent ... payment by a third party." Reply Mem. at 7. I am unpersuaded by their argument that a transfer of value violates § 186 only if the employer affirmatively and directly delivers the item of value to the labor representative.<sup>4</sup>

Section 186 forbids "all forms of bribery between management and labor officials" including indirect as well as direct means. *United States v. Lanni*, 466 F.2d 1102 (3d Cir. 1972). It does not permit such bribery as long as the schemes are structured so as to eliminate the need for management to affirmatively facilitate each transfer. Under such an interpretation employers could devise indirect or passive bribery schemes by simply affording labor representatives access to accounts and ignoring

<sup>4</sup> Nor can I read the Complaint to suggest that a "third party" delivered the bribes when it alleges that: (1) Eagleson alone controlled tournament profits; and (2) tournament profits belonging to the NHL were transferred to Eagleson with the NHL's knowledge or deliberate ignorance. ¶¶ 2-3.



their periodic withdrawals therefrom. I do not read § 186 so narrowly.

I thus conclude that the Complaint, which asserts that the NHL transferred funds to Eagleson through December 31, 1991 by knowingly or deliberately allowing him to appropriate a share of their joint venture profits, adequately alleges predicate acts occurring after November 7, 1991.

#### B. Pattern

A further predicate act does not postpone accrual of a RICO claim unless it is within the same pattern of racketeering activity. *Keystone*, 863 F.2d at 1126. A pattern arises from common purposes, results, participants, methods, and other traits. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989).

Plaintiffs allege that "through at least the end of 1991" the "object and purpose" of the racketeering scheme was to:

cause Eagleson ... to come under the influence and control of the NHL ... and to fail to aggressively represent the interests of the NHLPA players by granting unreasonable concessions to and failing to seek benefits from the NHL ... [and] to enable the Member Clubs to pay far less in compensation to the NHLPA players than they would otherwise have paid.

¶ 71. They thus allege common purposes underlying the scheme through the end of 1991.

Defendants argue that bribes to Eagleson in 1991 could not have shared these asserted purposes because Eagleson had not negotiated a collective bargaining agreement since 1988; thus any later bribes must have been "for some purpose other than to extract concessions ... in labor negotiations." Reply Mem. at 10.

I am not persuaded. First, payments may share a common purpose of management-labor bribery even if not intended to elicit future concessions; payments for past concessions can also form part of the same pattern. *Cox*, 17 F.3d at 1386. Second, the alleged object and purpose speaks not just in terms of bargaining concessions but also in terms of a more general failure to "aggressively represent" or "seek benefits for" the players. Reading these allegations favorably to plaintiffs, as I must when evaluating the sufficiency of the pleadings, I find that the alleged purpose extends beyond contract negotiations to all Eagleson's functions as a labor representative. His duty and opportunity to advance the players' interests, see ¶ 32, and thus the NHL's incentive to influence him, continued until he resigned as NHLPA Executive Director on December 31, 1991, regardless of when the last contract was entered or when it expired.<sup>5</sup> Because plaintiffs could prove facts consistent with their allegation that these payments shared a common purpose with the other alleged racketeering acts and formed part of the

<sup>5</sup> Indeed the incentive to influence a labor representative may be strongest when a collective bargaining agreement is up for renegotiation as may have been the case in late 1991.



same pattern, dismissal on the pleadings would be inappropriate. See *Hishon*, 467 U.S. at 73.<sup>6</sup>

Finding that plaintiffs have adequately alleged predicate acts that: (1) constitute part of the same pattern of racketeering activity; and (2) fall within the limitations period which extends back to November 7, 1991, I will deny defendants' motion to dismiss the Complaint as time-barred.<sup>7</sup>

## II. Standing and Proximate Causation

To establish standing to bring RICO a claim under 18 U.S.C. § 1964(c) plaintiffs must allege that defendants' violations proximately caused plaintiffs' injury. *Holmes v.*

<sup>6</sup> The complaint sufficiently alleges predicate acts of violating 29 U.S.C. § 501 occurring after November 7, 1991 and constituting part of the same pattern of embezzlement and conversion to bring Count II within the limitations period. See, e.g., ¶¶ 44-46, 81, 88, 96.

<sup>7</sup> Because *Keystone* delays accrual until notice of the last predicate act within the racketeering pattern and because I have found that the Complaint alleges such acts within the limitations period, I need not decide the date of other events that could trigger accrual. See 863 F.2d at 1126. I note, however, that because plaintiffs allege that both corruption of their labor representative and consequent losses of economic benefits occurred throughout 1991, see ¶¶ 4, 59, it would be difficult to conclude as defendants urge that any economic injuries suffered in 1991 were mere continuing effects of the 1988 collective bargaining agreement and could not under any set of facts constitute "new and distinct" injuries sufficient to delay accrual. See *Glessner v. Kenny*, 952 F.2d 702, 708 (3d Cir. 1991).

*Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992) (requiring "some direct relation" between violations and injuries).

I am unpersuaded by defendants' argument that plaintiffs' alleged injuries are derivative of the NHLPA's and thus could not have been proximately caused by the alleged violations. Count I alleges that, because of payments made in violation of § 186, Eagleson harmed the players' interests by making concessions and failing to seek benefits, causing "substantial suppression" in the players' earnings. See ¶¶ 1, 4, 57-59. Because the NHLPA had no rights to player salaries or benefits I conclude that the injuries alleged under Count I are not derivative of any harm inflicted on the NHLPA but rather were a consequence of the alleged racketeering scheme.

Count II alleges that Eagleson and others misappropriated NHLPA funds. Though this conduct clearly caused economic harm to the NHLPA, the NHLPA has assigned its claims to plaintiffs. This assignment eliminates any risk of double liability and permits plaintiffs to bring this claim. Cf. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 n.7 (1977) (noting double liability concern but declining to address standing issue).

Defendants, citing *United States for Use and Benefit of Wulff v. CMA, Inc.*, 890 F.2d 1070 (9th Cir. 1989), argue that the assignment cannot relate back to revive a claim filed by a party other than the real party in interest. However, Fed. R. Civ. P. 17(a) provides that:

No action shall be dismissed on the ground that it is not prosecuted by the real party in interest until a reasonable time has been allowed ... for ratification of commencement

of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The Rule is intended "to prevent forfeiture of an action when determination of the right party to sue is difficult or when an understandable mistake has been made." *Wulff*, 890 F.2d at 1074 (citing Fed. R. Civ. P. 17 advisory committee note; 6 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1555). In this case the players' and the union's interests are closely intertwined. The Count II allegations, which affect not just general union funds but also items like the players' pension fund and disability insurance, blur distinctions between the union's and the players' interests. In light of this difficulty in discerning the identity of the real party in interest, a difficulty which distinguishes this case from *Wulff*, I conclude that the purposes underlying Fed. R. Civ. P. 17 would be served by recognizing the assignment.<sup>8</sup> I thus

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<sup>8</sup> Though I need not reach the issue I note that plaintiffs might have had standing even without the assignment. In *Bass v. Campagnone*, 838 F.2d 10 (1st Cir. 1988), the court denied union members standing to assert a RICO claim since the alleged injuries affected the union rather than its individual members. *Bass* is distinguishable, however, because in *Bass* more than half the union members opposed the suit, demonstrating a divergence between the interests of the union as a whole and those of the plaintiffs. Indeed, the *Bass* court noted that had the plaintiffs demonstrated a consensus within the union by obtaining class certification the action might have survived the motion to dismiss "because it would have then alleged an injury

find that plaintiffs have demonstrated the requisite standing to assert Counts I and II of the Complaint.

### III. Personal Jurisdiction

A court cannot exercise personal jurisdiction over a defendant without a proper basis for serving the defendant with process. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). Plaintiffs seek to establish jurisdiction over Canadian defendants served in Canada under RICO's nationwide service provision, 18 U.S.C. § 1965, which allows service of process in "any judicial district of the United States."

Though § 1965 authorizes national service of process, it does not authorize international service. *Stauffer v. Bennett*, 969 F.2d 455, 460-61 (7th Cir.), cert.

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common to the class of local members." *Id.* While I reserve judgment on plaintiffs' motion for class certification I note that no such divergence of interests between the union and its constituent members appears at this point. Likewise, in *Rylewicz v. Beaton Serv., Ltd.*, 888 F.2d 1175, 1179 (7th Cir. 1989), which denied stockholders standing to assert a RICO claim for violations that diminished the corporation's value, the court noted that it could not find, as the plaintiffs urged, that the "distinction between a direct and a derivative injury is blurred in this case" since "various stockholders have opposed" plaintiffs' claims. By contrast, the distinction between direct and derivative harm fades in this case. The commonality of the harm to the union members blurs the distinction between harm to the NHLPA membership and harm to the NHLPA itself, undermining defendants' argument that under no set of facts could plaintiffs' injuries prove sufficiently direct to confer standing.



denied, 506 U.S. 1034 (1992); *Soltex Polymer Corp. v. Fortex Indus., Inc.*, 590 F. Supp. 1453, 1460 (E.D.N.Y. 1984).<sup>9</sup> Section 1965 thus does not authorize service of the Canadian defendants in Canada.

Plaintiffs must therefore serve process and attempt to establish personal jurisdiction under state law. See Fed. R. Civ. P. 4; *Brink's Mat Ltd. v. Diamond*, 906 F.2d 1519, 1522-23 (11th Cir. 1990). State law requires certain minimum contacts with Pennsylvania. See 42 Pa.C.S. § 5322(a).<sup>10</sup>

<sup>9</sup> *In re All Terrain Vehicles Litigation*, 1989 WL 32754 (E.D. Pa. 1989), did not permit service abroad under § 1965 but rather held only that § 1965's limitation to judicial districts of the United States did not invalidate service outside the United States that was properly effected under a state longarm statute.

<sup>10</sup> Though aggregate contacts with the United States may suffice under the Due Process Clause to confer jurisdiction over an alien properly served under a nationwide service of process provision, see *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290, 291, 294 (3d Cir.), cert. denied, 474 U.S. 980 (1985), when the nationwide service provision does not govern because it is limited to judicial districts of the United States and process was served abroad, aggregate national contacts cannot provide the basis for serving process. Plaintiffs must thus resort to state service of process provisions. Pennsylvania law permits service only when defendants have certain "minimum contact with this Commonwealth." See 42 Pa.C.S. § 5322(a), (b), (d). Absent this statutorily required forum-specific contact, service is not authorized, see § 5322(d), (b), and personal jurisdiction is lacking. See *Omni Capital*, 484 U.S. at 104.

Plaintiffs request and are entitled to discovery relevant to determining jurisdictional facts. See, e.g., *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 670 (D.C. Cir. 1996). They shall be permitted to take discovery regarding the Canadian defendants' contacts with Pennsylvania and disputed communications involving consent to service of process.

#### IV. Forum Non Conveniens

The doctrine of forum non conveniens permits a court, in its discretion, to decline to exercise jurisdiction it possesses. Thus the doctrine "can never apply if there is absence of jurisdiction." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). I cannot yet determine whether I may exercise personal jurisdiction over many of the defendants. I will thus reserve judgment on the forum non conveniens issue. Only after determining whether the Canadian defendants will remain in the case can I accurately assess whether a Canadian forum is more appropriate.<sup>11</sup>

#### V. Particularity

Because I am not yet assured of my personal jurisdiction over the Canadian defendants I reserve judgment as to the sufficiency of the pleadings against them.

<sup>11</sup> A party seeking transfer on forum non conveniens grounds must demonstrate both that there is an adequate alternate forum and that public and private interests weigh in favor of transfer. *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1225-26 (3d Cir. 1995); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43 (3d Cir. 1988). I do not reach either question at this time.



## VI. Transfer

Defendants urge the Court to transfer the action to the District of Massachusetts, where a grand jury has indicted Eagleson on criminal charges, in the interests of justice and convenience pursuant to 28 U.S.C. § 1404(a). They bear the burden of justifying the transfer. *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 756 (3d Cir. 1973); *Leonardo Da Vinci's Horse, Inc. v. O'Brien*, 761 F. Supp. 1222, 1229 (E.D. Pa. 1991).

Defendants argue that the Massachusetts court's "familiarity" with the case will expedite resolution and minimize conflicts between the civil and criminal cases. They have not shown any advantages concerning access to evidence, availability of compulsory process, convenience of witnesses<sup>12</sup> or other factors making trial more expeditious in Massachusetts than in Pennsylvania. See *O'Brien*, 761 F. Supp. at 1229.

Though ordinarily the pendency of a criminal case in another forum would weigh in favor of transfer, in this case Eagleson has not submitted to the Massachusetts court's jurisdiction. Consequently the criminal action has not progressed since the indictment was handed down two years ago. Discovery has not been taken and the Massachusetts judge has had no apparent opportunity or reason to become familiar with the case.<sup>13</sup> Moreover,

<sup>12</sup> Absent any argument that their testimony is material I find the Massachusetts residence of two of the plaintiffs unpersuasive. See *Plum Tree*, 488 F.2d at 756 n. 2, *O'Brien*, 761 F. Supp. at 1230.

<sup>13</sup> Indeed there is no assurance that the civil action if transferred would be assigned to the same Judge.

this action involves numerous defendants not under indictment in Massachusetts. I therefore find that defendants have not satisfied their burden of demonstrating that transfer to the District of Massachusetts will serve the interests of justice or convenience.

## VII. Stay

Defendants seek to stay civil proceedings pending resolution of the criminal action against Eagleson. Weighing the competing interests of plaintiffs, defendants, the courts, non-parties and the public, see *In re Residential Doors Antitrust Litigation*, 900 F. Supp. 749, 756 (E.D. Pa. 1995); *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D. Pa. 1980), I find that a stay is appropriate as to all aspects of this case except the outstanding jurisdictional issues.

Though many of the civil defendants are not under criminal indictment, Eagleson is the central figure in each case and the substantive allegations overlap considerably. Were the civil action to proceed, Eagleson would face a choice between defending himself in the civil action at the risk of incriminating himself in the criminal case, or asserting his Fifth Amendment privilege at the risk impeding his defense or raising an adverse inference. See *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

Plaintiffs have a general interest in proceeding expeditiously with their case. The instant case does not, however, present any particular risk of further violations, destruction of evidence, or other forms of prejudice due to delay. Plaintiffs' interests are therefore outweighed by the constitutional implications of Eagleson's interest. See

*Volmar Distrib., Inc. v. New York Post Co.*, 152 F.R.D. 36, 40 (S.D.N.Y. 1993).<sup>14</sup>

Because the other defendants are not under criminal indictment and would not face the same burdens as Eagleson in defending the civil case, I have considered staying the case only as to Eagleson. I have concluded, however, that a partial stay would not serve the Court's, the parties' or the witnesses' interests. Eagleson is a central figure in all the allegations and his testimony is critically important. Discovery taken without the benefit of his testimony would be incomplete and could require plaintiffs to repeat depositions in light of information later obtained from Eagleson. See *Volmar*, 152 F.R.D. at 41.<sup>15</sup> Thus I find that the benefits, if any, of allowing the rest of the case to proceed while staying the case only as to Eagleson would not outweigh the inefficiency and expense of the duplicative discovery likely to be necessitated thereby.

While the foregoing analysis applies to the substantive issues in the case it does not apply to defendants' jurisdictional challenge. Eagleson's contacts with Pennsylvania are not at issue in the criminal case. Therefore,

<sup>14</sup> The fact that the criminal indictment primarily involves the Count II allegations does not obviate the need for a stay as to Count I as well. Because both Counts involve Eagleson's alleged appropriation of tournament profits they are too factually intertwined for me to find that Fifth Amendment concerns are confined to Count II.

<sup>15</sup> Moreover, the availability of transcripts and other evidence from the criminal trial could streamline discovery, and the outcome of the criminal case could encourage settlement. See *Volmar*, 152 F.R.D. at 41-42.

as to these jurisdictional issues I do not find that Eagleson's risk of self-incrimination outweighs plaintiffs' interest in proceeding with their civil case. I will therefore permit discovery to proceed as to Eagleson and the other Canadian defendants regarding their contacts with Pennsylvania and will otherwise stay the case.

I would, however, be abusing my discretion to stay the case indefinitely. *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982). I am cognizant that Eagleson himself is a primary cause of the delay in the criminal case and that staying the civil action until resolution of the criminal case can only increase his incentive to prolong that delay. I will therefore enter the stay without prejudice to plaintiffs' right to petition the Court to have it lifted if the delay in the criminal case persists for an undue time after the jurisdictional issues in this case are resolved or if other circumstances so warrant.

AND NOW this day of July 22, 1996 upon consideration of defendants' motions to dismiss the Complaint or to transfer or stay the action, the parties' filings related thereto and the parties' oral arguments before the Court it is hereby ORDERED as follows:

(1) Defendants' motion to dismiss the Complaint as time-barred is DENIED.

(2) Defendants' motion to dismiss the Complaint for lack of standing is DENIED.

(3) The Canadian Defendants' motion to dismiss for lack of personal jurisdiction is hereby DENIED without prejudice to renewal following the close of discovery. Plaintiffs may take discovery regarding jurisdictional facts including the Canadian Defendants'

contacts with Pennsylvania and communications alleged to indicate consent to jurisdiction. Such discovery shall be completed within ninety (90) days from the date of this Order. The parties will submit briefs on the outstanding jurisdictional issues within thirty (30) days from the date of the close of discovery.

(4) Defendants' motion to transfer the case on *forum non conveniens* grounds is DENIED without prejudice to renewal by letter application following the Court's resolution of the outstanding jurisdictional issues. Such motion may be renewed upon existing or amended pleadings as appropriate.

(5) The Canadian Defendants' motion to dismiss the Complaint for lack of particularity is hereby DENIED without prejudice to renewal by letter application following the Court's resolution of outstanding jurisdictional issues. Such motion may be renewed upon existing or amended pleadings as appropriate.

(6) Defendants' motion to transfer the case to the District of Massachusetts is DENIED.

(7) Defendants' motion to stay this action is GRANTED and this action is hereby STAYED pending disposition of the criminal indictment except as to resolution of the outstanding jurisdictional issues as specified in paragraph (3) of this Order. This stay is entered without prejudice to plaintiffs' right to petition the Court to have it lifted on grounds identified in the accompanying Memorandum.



10

Supreme Court U.S.

FILED

MAR 21 1997

No. 96-663

CLERK

**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1996**

**MARVIN KLEHR and MARY KLEHR,**  
*Petitioners,*  
v.

**A.O. SMITH CORPORATION and  
A.O. SMITH HARVESTORE PRODUCTS, INC.,**  
*Respondents.*

**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

**BRIEF OF WASHINGTON LEGAL FOUNDATION,  
THE MANUFACTURERS ALLIANCE, AND  
THE ALLIED EDUCATIONAL FOUNDATION AS  
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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## QUESTIONS PRESENTED

1. Does the four-year limitations period applicable to civil RICO claims preclude claims filed more than four years after a plaintiff has been injured but within four years of the last predicate act committed as part of an alleged pattern of racketeering activity?

2. Is the four-year civil RICO limitations period restarted by the commission of predicate acts where those acts do not inflict additional injury on the plaintiff, above and beyond injuries inflicted by other predicate acts committed prior to commencement of the limitations period?

3. Where Petitioners waited 13 years from the date of their injury before filing suit, should the statute of limitations be tolled throughout that period based on conduct alleged to have been engaged in by Respondents?

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## IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1996

MARVIN KLEHR and MARY KLEHR,  
*Petitioners,*

v.

A.O. SMITH CORPORATION and  
A.O. SMITH HARVESTORE PRODUCTS, INC.,  
*Respondents.*

### ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

### BRIEF OF WASHINGTON LEGAL FOUNDATION, THE MANUFACTURERS ALLIANCE, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

#### INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting civil justice reform, including tort reform. To that end, WLF has appeared before this Court as well as other federal and state courts to argue against overly expansive theories of tort liability, excessive punitive damages, and imposition of unwarranted attorney fee awards. *See, e.g., BMW of North*

*America, Inc. v. Gore*, 116 S. Ct. 1589 (1996); *City of Burlington v. Dague*, 505 U.S. 557 (1992). In particular, WLF has worked to avoid overly expansive interpretations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.* See, e.g., *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

The Manufacturers Alliance is a non-profit research organization supported by more than 500 manufacturing companies from a broad range of industries. Its members range in size from relatively small, single-product manufacturers with annual sales revenues in the \$30 million to \$100 million range to very large, highly diversified manufacturers with annual sales revenues exceeding \$1 billion. Its mission is to assist its members in improving productivity by stimulating investment in technology and by encouraging innovations, thereby enhancing its members' worldwide competitiveness.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

*Amici* are concerned by the increasing invocation of RICO by civil litigants engaged in seemingly run-of-the-mill commercial disputes. As the Court itself recognized in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the civil RICO statute "is evolving into something quite different from the original conception of its enactors." *Sedima*, 473 U.S. at 500. While Congress adopted RICO as a tool to be used in fighting organized crime, civil RICO is now invoked primarily in "everyday fraud cases brought

against respected and legitimate enterprises." *Id.* at 499. *Amici* wish to ensure that the seemingly endless expansion of civil RICO claims does not engulf legal principles underlying statutes of limitations.

*Amici* submit this brief in support of Respondents with the written consent of all parties. The written consents are on file with the Clerk of the Court.

### STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement of the Case in Respondents' brief.

In brief, Petitioners Marvin and Mary Klehr operate a dairy farm in Minnesota. In 1974, they purchased a Harvestore silo manufactured and marketed by Respondent A.O. Smith Harvestore Products, Inc. ("AOSHPI"). This suit concerns several representations made by AOSHPI to Petitioner Marvin Klehr ("Klehr") in connection with the sale. According to Petitioners, AOSHPI stated that due to the Harvestore silo's "oxygen limiting" feature, problems associated with moldy or spoiled feed would be eliminated. AOSHPI stated that the new silo would eliminate the need to provide protein supplements to the cows, improve the health of the herd, increase milk production by three to five pounds of milk per day, and result in increased profitability.

Petitioners' experience with the Harvestore silo was disappointing. Beginning in 1976, Klehr observed chunks of mold in the feed on an annual basis. In 1982, mold and spoilage was particularly severe; Klehr called in agents for AOSHPI, who worked on the silo and claimed to have



fixed the problem. Klehr noticed increased health problems with his herd following installation of the new silo, and the herd experienced significant breeding and reproduction problems. Petition Appendix ("P.A.") at B-5, B-6. Moreover, despite the new silo, Klehr was never able to eliminate the need for protein supplements. P.A. B-7.

Throughout the period, AOSHPI continued to insist that its Harvestore silos were well designed. Petitioners state that they received from AOSHPI 20 pieces of advertising before the purchase and 38 pieces of advertising after the purchase, all attesting to the effectiveness of the Harvestore design. P.A. B-9. Petitioners contend that AOSHPI's claims were fraudulent -- AOSHPI knew that the Harvestore silo design was defective and was deliberately concealing those defects from its customers. P.A. B-8, B-9.

In April 1991, 17 years after purchasing the silo, Klehr for the first time ever looked inside the silo while feed was still being stored in it. P.A. A-6. He observed large amounts of mold. P.A. B-9. Klehr claims that he then realized for the first time that he had been feeding his cows moldy feed for one and one-half decades, and that the spoiled feed had caused his herd significant health problems. *Id.* Only then did Klehr do a careful check of his Dairy Herd Improvement Association records, and he realized for the first time that installation of the Harvestore silo had not led to the promised increased milk production and had not resulted in increased profitability. P.A. B-7, B-8.

On August 27, 1993, Petitioners filed suit against AOSHPI and Petitioner A.O. Smith Corp. (AOSHPI's parent corporation) in connection with the Harvestore silo purchase. Petitioners alleged several state-law causes of

action (including common law fraud), as well as RICO violations. On January 6, 1995, the U.S. District Court for the District of Minnesota entered summary judgment for Respondents, on the ground that Petitioners' claims were time-barred. P.A. B-1 to B-20. The district court held that Petitioners' RICO claims accrued when they "discover[ed], or reasonably should have discovered, both the existence and source of his injury and that the injury [wa]s part of a pattern." P.A. B-16 - B-17. The court held that Petitioners should have made those discoveries soon after they began noticing mold in their feed and experiencing difficulties with their herd. *Id.* Since more than four years elapsed from that date until suit was filed, the court held that the RICO claims were time-barred under the four-year limitations period established by *Agency Holding Corp. v. Malley-Duff Assocs., Inc.*, 483 U.S. 143 (1987). *Id.* The court held that any injuries suffered by Petitioners during the four years prior to filing suit did not give rise to a new RICO claim, because any such injuries were not "independent and distinct" from Petitioners' earlier injuries. *Id.* at B-18. The court also declined to invoke the doctrine of fraudulent concealment to toll the limitations period, because Respondents "did not conceal the facts constituting the cause of action." *Id.* at B-19 n.5.

On June 6, 1996, the U.S. Court of Appeals for the Eighth Circuit affirmed. P.A. A-1 to A-17. The appeals court applied the same accrual rule as was used by the district court: a RICO claim accrues "as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern." P.A. A-14. Using that rule, the appeals court determined that Petitioners' RICO claims accrued in the mid-1970s and thus were time-barred. P.A. A-15. The appeals court also held that Petitioners' failure

to act with "due diligence" precluded application of "equitable tolling principles" (P.A. A-17 n.11), and that none of Petitioners' alleged post-1989 injuries were sufficiently independent of his earlier injuries to permit restarting the limitations clock under the "separate accrual rule." P.A. A-16 - A-17.

This Court granted a writ of certiorari to consider when a civil RICO claim accrues for statute of limitations purposes, and whether the four-year civil RICO limitations period should have been tolled in this case based on Respondents' alleged active concealment of their fraud.

### SUMMARY OF ARGUMENT

In fashioning an accrual rule for civil RICO causes of actions, the Court should follow the accrual rule normally applied in federal actions: a civil RICO cause of action accrues when a defendant has violated the substantive provisions of RICO (18 U.S.C. § 1962) and the plaintiffs have discovered (or should have discovered, through due diligence) both the existence and cause of their injuries. There is no basis for further delaying accrual of a civil RICO action until the plaintiff has discovered, or should have discovered, that the defendants' conduct is part of a "pattern of racketeering activity." Once a plaintiff knows that he has been injured and how the injury was caused, he has been put on notice that he may have legal recourse against those who caused the injury. At that point, it is incumbent on a plaintiff not to sleep on his rights but rather to seek diligently to discover precisely what those rights are.

In any event, regardless whether the Court rules that accrual is delayed until the plaintiff discovers the pattern of

racketeering activity, Petitioners' claims are time-barred. They were aware of their injuries and the source of injuries as soon as they were incurred. Given Petitioners' knowledge that the silo was not performing as well as Respondents had promised and that Respondents' glowing reports regarding the success of Harvestore silos were at odds with Petitioners' experience, Petitioners very quickly were on notice that those reports were false, possibly intentionally so.

Only under the Third Circuit's "last predicate act" accrual rule was Petitioners' suit even arguably timely filed. But that rule has little to recommend it, in large measure because it produces limitations periods far longer than anything contemplated by the Court in *Agency Holding*.

Nor may Petitioners properly invoke the "separate accrual" rule in order to revive portions of their claim. The separate accrual rule holds that a new claim accrues, triggering a new four-year limitations period, each time a plaintiff discovers, or should have discovered, a new injury caused by the predicate RICO violations. But the injuries allegedly suffered by Petitioners in the four years before they filed suit were directly attributable to acts committed by Respondents outside the limitations period. The separate accrual rule is unavailable to Petitioners in the absence of evidence that their "new" injury is distinct from their time-barred injuries.

Finally, conduct allegedly engaged in by Respondents is insufficient to permit Petitioners to invoke equitable estoppel and thereby toll the running of the statute of limitations. Petitioners allege that Respondents continued to engage in mail fraud long after the sale of the Harve-



store silo to Petitioners, but there is no evidence that such mail fraud in any way impeded Petitioners' ability to investigate their claim. In the absence of such evidence, equitable estoppel is wholly inapplicable to this case.

## ARGUMENT

### I. THE LIMITATIONS PERIOD ON PETITIONERS' RICO CLAIM BEGAN TO RUN WHEN THEY DISCOVERED THEIR INJURY AND THE ELEMENTS OF THE RICO CLAIM EXISTED

Although the statute creating a civil right of action under RICO (18 U.S.C. § 1964)<sup>1</sup> does not contain an express statute of limitations, the Court held in *Agency Holding* that Congress should be assumed to have intended to impose a limitations period on civil RICO actions and that the most appropriate period was the four-year period established under the Clayton Act (15 U.S.C. § 15a) for civil antitrust actions. *Agency Holding*, 483 U.S. at 150. The reasons articulated in *Agency Holding* for adopting a RICO statute of limitations also counsel in support of adoption of the accrual rules suggested by Respondents.

The Court has explained in *Agency Holding* and elsewhere the important purposes served by statutes of limitations. Statutes of limitations:

---

<sup>1</sup> Section 1964(c) provides:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

[R]epresent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

*United States v. Kubrick*, 444 U.S. 109, 117 (1979).

The salutary purposes of statutes of limitations would be undermined, of course, if they were combined with accrual-of-action rules that allowed overly lengthy postponement of the commencement of limitations periods. The Court has stressed, therefore, that accrual rules must be determined with an eye toward the policies underlying the corresponding statute of limitations. *See, e.g., Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) ("Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. . . . In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application.").

Establishing a uniform federal rule of accrual in civil RICO cases seems appropriate in light of the concerns that animated *Agency Holding*. That decision held that adoption



of a uniform federal statute of limitations in civil RICO cases (as opposed to borrowing the most analogous state-law limitations period) was warranted in order "to avoid intolerable 'uncertainty and time-consuming litigation'" and because of "the lack of any satisfactory state-law analogue to RICO." *Agency Holding*, 483 U.S. at 150, 152 (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)). Those concerns are equally applicable to the issue of appropriate accrual rules. Indeed, since (as *Johnson* points out) statutes of limitations and accrual rules are so closely interrelated, it would make little sense to determine accrual rules by resort to state law -- which might not reflect the same balance between plaintiffs' and defendants' rights as the federal statute of limitations established in *Agency Holding*.

In deciding that a four-year statute of limitations should apply to civil RICO actions, the Court in *Agency Holding* gave no indication that it believes that civil RICO plaintiffs are entitled to any special degree of solicitude when it comes to determining whether claims are time-barred. Accordingly, the accrual rule normally applied in federal actions should be applied here: a civil RICO cause of action accrues when a defendant has violated the substantive provisions of RICO (18 U.S.C. § 1962) and the plaintiffs have discovered (or should have discovered, through due diligence) both the existence and cause of their injuries. See, e.g., *Kubrick*, 444 U.S. at 120-22 (accrual of action under Federal Tort Claims Act, 28 U.S.C. § 2401(b)); *Urie v. Thompson*, 337 U.S. 163, 169-70

(1949)(accrual of action under Federal Employers Liability Act).<sup>2</sup>

By requiring that a substantive violation of RICO exist before the civil RICO statute of limitations begins to run, the Court would fully placate the somewhat fanciful concern of Petitioners and their supporting *amici* (see, e.g., Brief of *Amicus Curiae* NASCAT at 6-7) that under the accrual rules devised by some appeals courts, the civil RICO limitations period could expire before an injured party ever had a right to file suit.<sup>3</sup> We term that concern "somewhat fanciful" because we are unaware of any appeals court (in-

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<sup>2</sup> While older tort cases traditionally held that a cause of action accrues as soon as the plaintiff is injured without regard to whether the plaintiff is aware of the injury, the more recent trend (which began with medical malpractice cases and has spread to other areas of the law) is to defer accrual until the plaintiff is aware (or should have been aware) of the injury and its cause. *Kubrick*, 444 U.S. at 120-21 & n.7. In most cases, of course, the plaintiff will become aware of an injury and its cause as soon as it is inflicted. But in some cases -- as when the symptoms of a disease develop over the course of many years -- the plaintiff will have no way of discovering that he has been injured until a considerable time after the injury was incurred. Some civil RICO cases undoubtedly fall into that latter category.

<sup>3</sup> NASCAT's concerns arise from the requirement that a defendant commit two predicate acts before the requisite "pattern of racketeering activity" can be said to exist. 18 U.S.C. § 1961(5). NASCAT argues that if a plaintiff is injured by the defendant's commission of a single predicate act and if the defendant does not commit a second predicate act until more than four years later, then the limitations period would have expired before the plaintiff could establish that the defendant had engaged in a "pattern of racketeering activity." A rule preventing the running of the statute of limitations until a substantive RICO violation exists (i.e., until the defendant has committed two predicate acts and the other substantive RICO requirements have been met) eliminates this concern.

cluding those circuits that have adopted the so-called "injury-discovery" rule) that have held directly that the civil RICO limitations period should begin to run even before a "pattern of racketeering activity" exists. Indeed, a number of appeals courts that have adopted the injury-discovery rule (cause of action accrues as soon as the plaintiff discovers, or should have discovered, his injury) have made clear that a RICO injury cannot be said to exist until such time as the defendant engages in a "pattern of racketeering activity." See, e.g., *Grimmett v. Brown*, 75 F.3d 506, 512 (9th Cir. 1996), cert. dismissed, 117 S. Ct. 592 (1997); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992).<sup>4</sup>

#### A. Awaiting a Plaintiff's Discovery of a Pattern of Racketeering Activity Is Unwarranted

There is no basis for further delaying accrual of a civil RICO cause of action until after the plaintiff has discovered, or should have discovered, that the defendants' conduct is part of a "pattern of racketeering activity." Once a plaintiff knows that he has been injured and how the injury was caused, he has been put on notice that he may have legal recourse against those who caused the injury. The Court has recognized that it is the "general rule" that the statute of limitation begins to run against such a plaintiff without regard to his knowledge of his legal

<sup>4</sup> In any event, even when there is only one injury, the likelihood that a defendant will commit one and only one predicate act is extremely small. For example, Petitioners allege that they received 20 pieces of fraudulent advertising from AOSHPI before purchasing the Harvestore silo and 38 pieces of fraudulent advertising after the purchase. Each such letter constituted a separate predicate act: mail fraud. 18 U.S.C. § 1961(1).

rights against those who caused the injury. *Kubrick*, 444 U.S. 121 n.7. The Court explained:

We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the facts of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged.

*Id.* at 122. A plaintiff who knows that he has been injured at the hands of a defendant is not rendered even more alert to the possibility that he may have legal recourse simply because he learns that the defendant's conduct toward him was part of a pattern of similar conduct engaged in by the defendant. Accordingly, there is no reason not to permit the civil RICO statute of limitations to begin running once the plaintiff knows that he has been injured by the defendant, without regard to his knowledge of a "pattern of racketeering activity."

In the rare case in which a plaintiff is unable, despite due diligence, to learn about the defendant's pattern of racketeering activity, equitable tolling is available to prevent inequity. The Court has made clear that federal statutes of limitations are subject to equitable tolling, which shelters a plaintiff from the statute of limitations in cases in which strict application would be inequitable. *Burnett v.*



*Central R.R. Co.*, 380 U.S. 424, 427 (1965). See also, *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) ("Equitable tolling is invoked when the prospective plaintiff simply does not have and cannot with due diligence obtain information essential to bringing a suit."); *Phillips v. Heine*, 984 F.2d 489, 491 (D.C. Cir. 1993). Indeed, appeals courts that have held that civil RICO claims accrue without regard to the plaintiffs' knowledge of a pattern of racketeering activity have stated explicitly that equitable tolling may be available in appropriate cases to prevent the expiration of the limitations period against a diligent plaintiff who is unable, despite best efforts, to learn of such a pattern. See, e.g., *Rodriguez v. Banco Central*, 917 F.2d 664, 668 (1st Cir. 1990) (Breyer, J.); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir. 1988) *cert. denied*, 490 U.S. 1009 (1989).

To say that the statute of limitations is subject to equitable tolling in such cases is, of course, significantly different from holding that the statute does not even begin to run until the plaintiff knows, or should know, of the defendant's pattern of racketeering activity. Equitable tolling "gives the plaintiff extra time only if he needs it. . . . The purposes of the doctrine are fully served if the court extends the time for filing by a reasonable period after the tolling period is ended." *Phillips*, 984 F.2d at 492. Thus, under equitable tolling principles, a diligent plaintiff for whom the four-year civil RICO limitations period has already run would be afforded (at most) a several-month extension to file suit after learning of the pattern of racketeering activity -- not the additional four years permitted under the injury-and-pattern discovery rule employed by the Eighth Circuit in the instant case.

## B. The Third Circuit's "Last Predicate Act" Accrual Rule Inappropriately Lengthens the Limitations Period

Since even the Eighth Circuit's liberal accrual rule is of no benefit to Petitioners, they urge the Court to adopt the Third Circuit's "last predicate act" accrual rule. Under that extremely liberal accrual rule, a plaintiff may file a civil RICO action at any time up to four years after the last predicate act committed by the defendant, even if the predicate act causing injury to the plaintiff occurred prior to the limitations period -- provided only that "the predicate act causing injury and the predicate act relied upon are part of the same pattern." *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988). Petitioners' Brief 22-34.

The "last predicate act" rule has little to recommend it. As the First Circuit noted, it can produce extremely long limitation periods. *Rodriguez*, 917 F.2d at 666. A plaintiff can sue to recover for injuries suffered decades earlier if he can demonstrate that the defendant has continued to engage in the same activities, regardless whether the plaintiff has been affected by those later activities. Such a result seems wholly inconsistent with *Agency Holding's* determination that four years was the most appropriate civil RICO limitations period.

Moreover, the "last predicate act" rule inappropriately focuses on the defendant's conduct rather than on injury suffered by the plaintiff. RICO provides a civil cause of action only to one who has been "injured in his business or property" (18 U.S.C. § 1964(c)) as a result of activities prohibited by the substantive RICO provisions, not to those who might have been injured but were not or to those simply seeking to root out racketeering activity. *Sedima*, 473



U.S. at 496. Accordingly, there can be no justification for reviving an otherwise time-barred civil RICO claim simply because the defendant has committed additional predicate acts, if those acts have no effect on the plaintiff.

In support of the "last predicate act" rule, Petitioners note that the statute of limitations for criminal prosecution of RICO violations runs from the commission of the last predicate act. Petitioners' Brief 25-26. But considerations factored into accrual of criminal statutes of limitations are far different from those affecting accrual in civil cases. Most importantly, since there is no injury requirement in a criminal RICO case, there is no occasion to focus on the date of injury when making accrual determinations. Indeed, civil and criminal RICO cases are sufficiently different that the Court rejected any thought in *Agency Holding* of looking to the five-year criminal RICO statute of limitations when choosing an appropriate statute of limitations for civil RICO cases. *Agency Holding*, 483 U.S. at 155-56.

### C. Petitioners' Claims Are Time-Barred Under Any Potentially Appropriate Accrual Rule

Under the appropriate civil RICO accrual rule outlined above, Petitioners' claims are clearly time-barred. Soon after they purchased the Harvestore silo, Petitioners were aware of their injury. They observed chunks of mold in the feed every year after the purchase. They noticed increased health problems with their herd, which also experienced significant breeding and reproduction problems. Although Klehr claims not to have realized until 1991 that the purchase failed to improve productivity and profitability (as Respondents had promised it would), that information was

available to Petitioners from the mid-1970s if they had bothered to examine relevant records.

Petitioners at the same time were also aware (or ought to have been aware) that their injury was attributable to the new silo purchased from Respondents. Klehr has admitted that he was aware that the problems that developed with his herd were symptoms that could be expected among cows eating moldy and spoiled feed. Petitioners were also aware that the specific promises made to them by Respondents (that the new silo would eliminate the need for protein supplements, improve the health of the herd, increase milk production by three to five pounds of milk per day, and result in increased profitability) were not being fulfilled. Given Petitioners' admission that a pattern of racketeering activity was on-going during that same time frame, Petitioners' civil RICO claims accrued sometime in the mid-1970s, and the statute of limitations on those claims began to run. Accordingly, Petitioners' suit (not filed until August 27, 1993) was properly dismissed as time-barred.

Petitioners have not suggested that they were entitled to equitable tolling in order to discover facts necessary to maintain their RICO claim. Nor would any such suggestion be justified. For example, the letters that Petitioners claim to have received repeatedly from Respondents (which allegedly included intentional misrepresentations) provided Petitioners with all the evidence they needed in order to establish a "pattern of racketeering activity." While Petitioners might not have known initially that Respondents' misrepresentations in those letters were intentional, they certainly were put on notice of that possibility when Respondents' letters continued to speak glowingly about Harvestore silos in the face of Petitioners' unhappy experience with their silo. Most importantly, any equitable tol-

ling would only operate to permit Petitioners to file suit during the brief period following their April 1991 "discovery" of Respondents' fraud. Since Petitioners waited more than two additional years before filing suit, equitable tolling may not be invoked to avoid application of the statute of limitations.

Even under the Eighth Circuit's injury-and-pattern accrual rule, the RICO claim is still time-barred. Under that rule, the statute of limitations would not begin to run until, *inter alia*, Petitioners knew (or should have known) that the Respondents were engaged in a pattern of racketeering activity. But, assuming that Respondents' letters contained intentional misrepresentations, Petitioners knew (based on the many letters they received) that Respondents were engaged in a "pattern of racketeering." As noted above, at the very least Petitioners were on notice that the false promises made to them by Respondents were intentionally false.

In sum, the lower courts correctly determined that, applying appropriate accrual rules to Petitioners' civil RICO claims, those claims were time-barred.

## II. PETITIONERS MAY NOT PROPERLY INVOKE THE SEPARATE ACCRUAL RULE IN ORDER TO REVIVE PORTIONS OF THEIR CLAIMS

That claims based on earlier injuries resulting from a pattern of racketeering activity may be time-barred does not prevent a plaintiff from recovering under RICO for later injuries resulting from the same pattern. All appeals courts that have addressed the issue have recognized such a "separate accrual rule," which permits the assertion of later-arising claims. *See, e.g., Bingham v. Zolt*, 66 F.3d

553, 559 (2d Cir. 1995) ("we recognize a 'separate accrual' rule under which a new claim accrues, triggering a new four-year limitations period, each time plaintiff discovers, or should have discovered, a new injury caused by the predicate RICO violations"); *State Farm Mutual Automobile Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring) ("a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and other acts were committed outside the limitations period").

The separate accrual rule is of no benefit to Petitioners in this case, however. The principal injury they claim to have suffered as a result of Respondents' pattern of racketeering activities is economic loss occasioned by their use of a defective silo. Petitioners contend that they continued to suffer those losses over a period of many years for so long as they used the Harvestore silo. Petitioners contend that Respondents engaged in predicate acts (mail fraud) during the four years before suit was filed, in that Respondents continued to send material to Petitioners extolling the benefits of Harvestore silos. But Petitioners can point to no injury flowing from these later predicate acts that was distinct in any way from the injury they were already suffering as a result of their continued use of the silo. The courts below correctly determined that when the injuries relied on by a civil RICO plaintiff "are all of the same type, flow from the same source, and are part of one cognizable pattern of conduct," the plaintiff may not rely on the "separate accrual" rule to revive their claims. P.A. A-16.

The Eighth Circuit's ruling in this regard is consistent with all other federal appeals courts that have addressed the issue. In a closely analogous case, the Second Circuit declined to apply the RICO separate accrual rule to con-



tinuing injuries allegedly suffered by a purchaser of electrical generators that did not perform as well as promised. *Long Island Lighting Co. v. Imo Indus., Inc.*, 6 F.3d 876, 887 (2d Cir. 1993). Even though the purchaser suffered injuries within the limitations period due to its decision to continue making use of the defective equipment, those injuries did not constitute a new RICO cause of action because they were not independent of the original, time-barred injury. The Second Circuit explained that since the extent of the injuries was ascertainable at the time the injuries were first discovered or discoverable, they could have been recovered as damages in an earlier RICO action and thus were barred. *Id.*

Nor does it matter that Petitioners allege that Respondent continued to commit predicate acts during the four years prior to suit being filed, so long as any injuries alleged to have flowed from those later predicate acts were not in excess of the damages Petitioners could have recovered in an earlier RICO action. A defendants' continuation of a course of conduct does not extend a limitations period where the damages arising from such continuation are identical to the damages arising from the earlier, time-barred conduct. Thus, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), the Court held that a claim for lost profits under the antitrust laws may be time-barred if it could have been asserted in an earlier action for lost future profits -- even though the antitrust conspiracy has continued. *Zenith Radio*, 401 U.S. at 339. Similarly, in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Court held that the statute of limitations for a national origin discrimination claim under 42 U.S.C. § 1981 began to run from the date on which a college determined that it would not grant tenure to a professor, even though the college took numerous steps

following that determination (such as failure to renew a one-year "terminal" contract that followed the tenure decision) that confirmed and carried out its allegedly discriminatory decision. The Court rejected claims that acts carrying out prior discriminatory decisions (e.g., the final termination of the plaintiff's employment) extend the limitations period; the Court explained that "the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." *Id.* at 258 (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (1979))(emphasis in original).

Similarly, subsequent predicate acts should not start the RICO clock running again when the only injuries resulting from those subsequent acts are injuries also directly attributable to predicate acts committed outside the limitations period. See *State Farm Mutual*, 828 F.2d at 5 (Kennedy, J., concurring)("A corollary rule [to the separate accrual rule] is that damages may not be recovered for injuries sustained as a result of acts committed outside the limitations period."). In the absence of any evidence that the injuries allegedly sustained by Petitioners as a result of Respondents' latest predicate acts were in any way distinct from the damages that Petitioners could have sought years ago in an earlier RICO action, damages for such injuries are time barred.

### III. RESPONDENTS' ALLEGED CONCEALMENT OF THEIR FRAUD DOES NOT WARRANT TOLLING THE STATUTE OF LIMITATIONS

Petitioners also argue that the doctrine of equitable estoppel should be applied to relieve them from the statute



of limitations, because Respondents allegedly took steps to actively conceal their misconduct. Petitioners Brief 45-49.

Petitioners argument is without merit. Petitioners have not alleged any conduct by Respondents that rises to the level of active concealment. While Respondents never admitted to their alleged fraud, they are not alleged to have made "a special effort to cover up the fraud." *Wolin*, 83 F.3d at 852. More importantly, Respondents were simply not in a position to cover up their alleged fraud, because Petitioners had available to them all the materials necessary to determine that the Harvestore silo was not performing as promised.

In any event, Petitioners' civil RICO cause of action would be time-barred, even if equitable estoppel were applied in this case to toll the statute of limitations. Petitioners contend that they were first fully aware of the extent of Respondents' wrongdoing in April 1991 when Klehr and Dr. William Olson looked inside the Harvestore silo. Yet, Petitioners did not file suit until more than two years later, on August 27, 1993. Equity provides an aggrieved plaintiff with only enough additional time to prepare and file his suit after learning the necessary facts; it does not set the clock at zero and give the plaintiff four additional years within which to file suit. *Phillips*, 984 F.2d at 492. Two years and four months was an unreasonable amount of time for Petitioners to delay following the date on which they became fully aware of all relevant facts. Accordingly, equitable estoppel provides no support for Petitioners.

## CONCLUSION

*Amici curiae* Washington Legal Foundation, the Manufacturers Alliance, and the Allied Educational Foundation respectfully request that the Court affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA  
1998-01-100

DAVID H. BROWN AND JEFFREY E. BROWN

Petitioners

U.S. BANK CORPORATION AND  
U.S. BANK NATIONAL ASSOCIATION, INC.

Respondents

The Clerk of the Court to the  
United States Court of Appeals for the Eighth Circuit

**AMICUS CURIAE BRIEF OF  
THE NATIONAL ASSOCIATION OF MANUFACTURERS  
IN SUPPORT OF THE RESPONDENTS**

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The National Association of Manufacturers ("NAM") respectfully submits this *amicus curiae* brief in support of respondents A.O. Smith Corporation and A.O. Smith Harvestore Products, Inc.<sup>1</sup>

### **INTEREST OF AMICUS CURIAE**

The NAM is the nation's oldest and largest broad-based industrial trade association. It has more than 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers. These firms are located in every state, produce about 85 percent of U.S. manufactured goods, and employ more than 18 million persons. Through its member companies and affiliated associations, the NAM represents every industrial sector.

The NAM's members are legitimate businesses, who often find themselves accused of "racketeering" conduct in treble-damage civil suits brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. These claims typically involve "garden-variety" commercial disputes, involving matters such as false-advertising claims or contract disputes.

### **SUMMARY OF THE ARGUMENT**

In determining when civil RICO claims accrue, for statute of limitations purposes, the Court should adopt a rule which (1) protects defendants against stale claims and (2) provides definite repose from past, contingent liabilities. Those goals were stressed by the Court in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), in adopting a

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<sup>1</sup>Counsel for both the Petitioners and the Respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

four-year limitations period for civil RICO claims, and should likewise guide selection of the proper limitations-accrual rule.

The "last predicate act" accrual rule urged by petitioners should be rejected because it would allow recoveries on stale claims and would frustrate the goal of repose. That rule, if adopted, would permit claims to be brought seeking recoveries for readily-apparent injuries incurred decades earlier, as long as a single predicate act occurred in the four years prior to the filing of the civil RICO suit. Actions asserting such hoary RICO claims pose the risk of crippling treble damages despite the severe prejudice to defendants in their ability to marshal exculpatory evidence due to the passage of time, the departure of employees, the inevitable fading of memories, and other factors. The enduring cloud of long-lived RICO liability based on events occurring decades earlier would also create a severe drag on the ability of business to raise capital, borrow money, enter into corporate transactions, and generally run their businesses.

The Court should therefore avoid any accrual rule that operates, in effect, to extend the four-year limitations period for civil RICO claims to span many additional years in those cases where the alleged injuries and legal violations are readily apparent and there have been no affirmative acts of fraudulent concealment.

## **ARGUMENT**

### **I. THE COURT SHOULD ADOPT AN ACCRUAL RULE THAT PREVENTS STALE CLAIMS AND PERMITS CONTINGENT LIABILITIES TO LIE IN REPOSE**

When this Court adopted a uniform statute of limitations for civil RICO claims in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), it was guided by the fundamental principle that it is "utterly repugnant" to allow federal suits to be brought "at any distance of time." *Malley-Duff*, 483 U.S. at 156 (quoting from *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)).

This "repugnance" stems from two concerns. As the Court elaborated:

[1] Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. [2] In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.

*Malley-Duff*, 483 U.S. at 156 (quoting from *Wilson v. Garcia*, 471 U.S. at 271). The Court also noted that limitations principles should not apply in such a way that "[d]efendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose." *Id.* (quoting from *Wilson v. Garcia*, 471 U.S. at 275 n. 34).

The "last predicate act" accrual rule advanced by petitioners, and the similar rule used at one time by the Third Circuit in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988), badly fails both principles. Under those rules, a



RICO plaintiff can incur injuries in year 1, continue to incur injuries in years 2 through year 20 which are readily apparent to a reasonably diligent person, and then sue in year 20 for injuries incurred during the *entire* 20 years.

The staggering implications of such a rule are apparent from the present case. To begin, a "garden-variety" false-advertising claim,<sup>2</sup> involving a sale of a silo by a legitimate business to farmers, can easily be pled as a RICO "racketeering" violation although no criminal conviction has occurred and the defendant is a respected business. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989). This demonstrates that any manufacturer in America can be put to the substantial expense of defending RICO claims -- many of which are unfounded and brought to coerce higher settlements -- for the sale of any of its products, and based on as little as any two advertising claims, made to any of the manufacturer's thousands, millions, or even tens of millions of customers.

That exposure is bad enough, but one that manufacturers must presently face as the cost of doing business.<sup>3</sup> However,

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<sup>2</sup> In *Malley-Duff*, the Court noted that civil RICO claims can address "'garden variety' business disputes" including "breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, disparagement, etc." 483 U.S. at 143 (quoting court of appeals opinion).

<sup>3</sup> The Court has construed RICO to apply to legitimate, "respected" businesses that have not been convicted of any predicate criminal offense. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 493, 499 (1985). The Court observed that, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." 473 U.S. at 500. There is no cause to adopt an accrual rule that exacerbates this trend when the statute itself is silent on the issue of (continued...)

the associated number of potential claims, and their magnitude, would be increased vastly under the petitioner's proposed accrual rule. If that rule were adopted, claims could be brought for injuries incurred decades ago if a product is still offered for sale today, even where the plaintiff's injuries were at all times readily apparent. No precedent has been cited by petitioners for such a result from any other civil cause of action.<sup>4</sup>

At the same time, the ability of manufacturers effectively to defend such claims would be limited due to the staleness of the evidence. With the passage of time, employees leave, memories fade, ownership of manufacturing firms may change hands one or more times, and exculpatory evidence may be discarded inadvertently or in the ordinary course of business. As a practical matter, most manufacturing firms will lack ready and complete evidence of the multitudinous transactions in which they have been engaged over the course of many years. Potential plaintiffs will be at a marked advantage, since their own accounts of their individual interactions with the defendant will be difficult to impeach with specific evidence.

Petitioners suggest (at 31) that an open-ended accrual rule is appropriate to vindicate the public-interest purpose of civil RICO claims. This contention should be given no weight in view of the Court's ruling in *Shearson/American Express Inc.*

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<sup>3</sup>(...continued)  
accrual.

<sup>4</sup> While product-liability claims are often permitted to be filed many years after an injury-causing act occurred, that may be permitted because the injury may manifest itself only after a lengthy delay of years or decades. In this case, however, petitioners' "last predicate act" rule would permit claims to be pursued for all damages incurred at any time, even if the injury was readily apparent at all times, so long as a final unlawful act occurs within the final four-year period prior to suit.

v. *McMahon*, 482 U.S. 220, 242 (1987), that “[t]he private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff.” The Court further explained that the “policing function” of the RICO damages remedy “was a secondary concern.” 482 U.S. at 240-41. Accordingly, petitioners cannot justifiably cloak their plea for an open-ended accrual rule in “public interest” garments.

Likewise, the Court should not adopt a virtually boundless accrual rule by dint of Congress’ direction that RICO’s provisions be “liberally construed,” because the Court has noted that this was “not an invitation to apply RICO to new purposes that Congress never intended.” *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). The Court has determined in *Malley-Duff* that the policies favoring repose, and avoidance of stale claims, apply to civil RICO claims. The accrual rule adopted by the Court should not serve to frustrate those policies.

In short, an open-ended accrual rule for civil RICO claims would be a disaster for American business. Some of the adverse affects are described further below.

## II. A BOUNDLESS ACCRUAL RULE WILL IMPOSE SUBSTANTIAL ECONOMIC COSTS ON AMERICAN BUSINESSES

The burdens presented by an open-ended RICO accrual rule will not fall infrequently or on isolated occasions, because civil RICO claims are filed by the hundreds each year. The Administrative Office of the United States Courts reported that 849 civil RICO cases were filed in the federal district courts in the 12-month period ending September 30, 1996, and 900 were filed in the prior year. ANNUAL REPORT OF THE DIRECTOR,

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *SUPPLEMENTAL TABLES*, Table C-2 (1996). Apart from their sheer numbers, civil RICO claims are brought against all sorts of businesses, and are rooted in “garden-variety” disputes involving matters as diverse as false advertising (such as this case), insurance disputes, and contract disputes. See note 2, *supra*. Increasingly novel applications are being urged for civil RICO claims, extending even into the realm of sexual harassment.<sup>5</sup> As this Court held in *National Organization of Women, Inc. v. Schleider*, 510 U.S. 249, 259 (1994), an entity can be subject to civil RICO liability even if it does not engage in unlawful activity for an “economic motive.”

The economic costs associated with the defense of stale claims, and uncertain contingent liabilities for prior periods, are borne by manufacturers and other firms across the nation. Enormous direct and indirect costs would be imposed on American businesses by petitioners’ proposed accrual rule, which would permit recoveries for RICO violations going back 19 years in this case, and potentially longer in others.

For example, businesses that seek to purchase insurance in order to protect themselves against crushing RICO liabilities would find it difficult and more costly to obtain such insurance against the greater number and magnitude of claims that could result from the longer period of liability exposure. Insurers have “reacted sharply to the disappearance of litigation time limits” by shifting from “occurrence” to “claims-made” policies, and ceasing to write coverage at all when “[p]ricing a policy to cover the risk intelligently [is] impossible.” Peter W. Huber, *LIABILITY: THE LEGAL REVOLUTION AND ITS*

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<sup>5</sup> See William H. Kaiser, *Extortion in the Workplace: Using Civil RICO to Combat Sexual Harassment in Employment*, 61 BROOKLYN L. REV. 965 (Fall 1995).



CONSEQUENCES 139 (1988). The cost of insurance, when available, is necessarily increased by the greater period of potential risk. *Id.* at 141. If insurance is not available, prudent firms must instead take reserves against potential claims. In either case, funds that could be used in productive enterprises -- to create jobs, invest in capital equipment, or in entrepreneurial ventures -- are diverted to higher insurance premiums or to unproductive liability reserves.

Businesses facing possible civil RICO suits from stale claims may also be limited in their ability to raise capital, or borrow money, in public or private markets. Investors and lenders will avoid businesses that face false-advertising or other similar claims if the exposure for past damages is unlimited in time. These effects can be substantial, as evidenced by the difficulties that the Superfund law<sup>6</sup> has created in capital-formation and borrowing for firms that face potential liabilities for industrial pollution occurring thirty, forty, or more years ago. One leading bond-rating agency has concluded that the exposure of entire industries to environmental liabilities dating back decades affects those industries' overall credit risk and may pose concerns about "corporate solvency."<sup>7</sup> The same problems may also impair corporate combinations or mergers with firms that have potential RICO exposure dating back decades, even though such combinations or mergers may otherwise offer benefits to shareholders or the public generally

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<sup>6</sup> The Superfund law is more formally known as the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675.

<sup>7</sup> "Moody's believes that environmental liabilities may pose significant credit risks because of their potential for creating sudden and possibly large financial obligations on past generators of waste materials." Moody's Special Comment, *Environmental Risks and Corporate Credit Quality* (April 1991).

through synergies or other means. This experience may parallel that in the environmental field, where one study reported that "91% of firms surveyed evaluate the environmental performance of potential [acquisition] partners." The Center for Environmental Management, Tufts University, *MULTINATIONAL CORPORATIONS AND THE ENVIRONMENT: A SURVEY OF GLOBAL PRACTICES*, at 9 (April 1991).

Potential business defendants facing the risk of stale claims will also incur greater records retention expenses, because it will be prudent for businesses to retain records for longer periods. For example, this case illustrates the potential need for the manufacturer of a product to retain records of its dealings with each and every customer for twenty years or more. It is well recognized by corporate records managers that "[t]he various statutes of limitations are part of the legal framework on which a good records policy is structured." 1 William A. Hancock (ed.), *GUIDE TO RECORDS RETENTION* 109 (1995). These requirements "are imposing an *increasing burden on business to maintain records for extremely long periods of time.*" *Id.* at 103 (emphasis in original). The cost of doing so could be staggering for large manufacturing firms, which sell products by the millions, or even tens of millions, to the general public. Indeed, because employees often move from one employer to another with some frequency, firms that prudently anticipate potentially stale claims would need to incur the expense of routinely obtaining written statements from departing employees about numerous subjects, or alternatively track their whereabouts.

None of these costs are inevitable, or unavoidable, if the accrual rule adopted by this Court sets reasonable bounds on the temporal scope of civil RICO liability. The Court should not allow "real or imagined malefactors [to be] chased eternally down the corridors of time." Huber, *LIABILITY*, *supra*, at 97.



Instead, the Court should adopt a rule that allows “ancient controversies to rest in peace so that once-fresh wounds would have a chance to heal.” *Id.*

### **CONCLUSION**

For the foregoing reasons, the Court should reject the accrual rule proposed by petitioners and affirm the judgment below.

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